

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 7

**NATIONAL COUNCIL OF AMERICAN-SOVIET
FRIENDSHIP, INC., DENVER COUNCIL OF
AMERICAN-SOVIET FRIENDSHIP, ET AL., PETI-
TIONERS,**

vs.

**J. HOWARD McGRATH, ATTORNEY GENERAL OF
THE UNITED STATES, SETH W. RICHARDSON,
CHAIRMAN OF THE LOYALTY REVIEW BOARD
OF THE UNITED STATES CIVIL SERVICE COM-
MISSION, ET AL.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITION FOR CERTIORARI FILED JANUARY 23, 1950.

CERTIORARI GRANTED MAY 15, 1950.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10165

NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, INC.
et al., *Appellants,*

vs.

TOM C. CLARK, individually and as U. S. Attorney
General, et al., *Appellees.*

Appeal from the United States District Court for the
District of Columbia

JOINT APPENDIX TO BRIEFS

1 Filed Jun 29 1948 Harry M. Hull, Clerk

Civil Action No. 2663-48

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA**

NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, INC.

114 East 32nd Street

New York 16, New York

DENVER COUNCIL OF AMERICAN-SOVIET FRIENDSHIP

667 South Downing Street

Denver 9, Colorado

WILLIAM HOWARD MELISH

126 Pierrepont Street

Brooklyn, New York

RICHARD MORFORD

114 East 32nd Street

New York 16, New York

HENRY PRATT FAIRCHILD

230 East 48th Street

New York, New York

JOHN A. KINGSBURY

Lavorika, Shady, New York

M. WALTER PESMAN

372 South Humboldt Street

Denver, Colorado

CORLISS LAMONT

450 Riverside Drive

New York 27, New York

Plaintiffs,

vs.

**TOM C. CLARK, individually and as Attorney General of the
United States, SETH W. RICHARDSON, individually and
as Chairman of the Loyalty Review Board of the
United States Civil Service Commission, GEORGE W.
ALGER, JOHN HARLAN AMEN, HARRY A. BIGELOW, AARON
J. BRUMBAUGH, JOHN KIRKLAND CLARK, CLEM W. COL-
LINS, HARRY W. COLMERY, BURTON L. FRENCH, META**

GLASS, EARL G. HARRISON, GARRETT HOAG, WILBUR LA ROE, JR., LAWRENCE T. LEE, ARTHUR W. MAC MAHON, CHARLES E. MERRIAM, HENRY PARKMAN, JR., MURRAY SEASONGOOD, HARRY L. SHATTUCK, MRS. HARPER SIBLEY and JAMES F. TWOHY, individually and as members of the Loyalty Review Board of the United States Civil Service Commission,

Defendants.

Complaint for Injunction and Declaratory Judgment

The plaintiffs, NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, INC., DENVER COUNCIL OF AMERICAN - SOVIET FRIENDSHIP, WILLIAM HOWARD MELISH, RICHARD MORFORD, HENRY PRATT FAIRCHILD, JOHN A. KINGSBURY, M. WALTER PESMAN and CORLISS LAMONT complaining of the defendants, allege:

2

I. *Jurisdiction*

1. The jurisdiction of the Court in this action arises under sections 11-301, 11-305 and 11-306 of the District of Columbia Code, section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. Code, Sec. 1009, and the Act of June 14, 1934, as amended, 28 U. S. C. Sec. 400.

II. *Purpose of Action*

2. This action is brought to enjoin the Attorney General from keeping in effect his designation of the NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, INC. (hereinafter called the NATIONAL COUNCIL) purportedly made pursuant to Executive Order 9835, the so-called Federal Loyalty Order, and to require him to strike the name of the NATIONAL COUNCIL from any and all designations purportedly made under said Executive Order; to enjoin the Loyalty Review Board from publicizing and using such designation; and to obtain a declaratory

judgment that such designation is unconstitutional and otherwise illegal and that Part III, Sec. 3, and Part V, Sec. 2f, of the Executive Order 9835 are unconstitutional.

III. Parties

A. PLAINTIFFS

3. The NATIONAL COUNCIL is a non-profit membership corporation, organized in February, 1943, and existing under the laws of New York. Its purpose is to strengthen friendly relations between the United States and the Union of Soviet Socialist Republics by disseminating to the American people educational material regarding the Soviet Union, by developing cultural relations between the peoples of the two nations, and by combatting anti-Soviet propaganda designed to disrupt friendly relations between the peoples of these nations and to divide the United Nations. The NATIONAL COUNCIL has as affiliates a number of local Councils in various cities of the United States, which assist it in carrying out its objectives and program. Also affiliated with it and endorsers of its purposes are a large number of persons eminent in professional, cultural and social fields known as Sponsors of the NATIONAL COUNCIL.

4. The DENVER COUNCIL OF AMERICAN-SOVIET FRIENDSHIP (hereinafter called the DENVER COUNCIL) is an unincorporated association located in the City of Denver, Colorado, affiliated with the NATIONAL COUNCIL.

3 5. The plaintiff, REV. HOWARD MELISH, is the Chairman of the NATIONAL COUNCIL and a member of its Board of Directors. Said plaintiff is and has been for many years the Assistant Rector of the Church of the Holy Trinity in the Borough of Brooklyn, City of New York.

6. The plaintiff, REV. RICHARD MORFORD, is Executive Director of the NATIONAL COUNCIL, a member of its Board of Directors and is employed by the NATIONAL COUNCIL on a full-time basis.

7. The plaintiff, HENRY PRATT FAIRCHILD, is Secretary and former Treasurer of the NATIONAL COUNCIL and a member of its Board of Directors. He is Professor Emeritus of Sociology of New York University and a consultant to a commission of the Economic and Social Council of the United Nations, and an expert on population movements and a public lecturer.

8. Plaintiff DR. JOHN A. KINGSBURY has been a Sponsor since the inception of the NATIONAL COUNCIL, became a member of the Board of Directors in January, 1948, and subsequently became Treasurer of the NATIONAL COUNCIL. He has held many positions of public importance, particularly in the field of charitable endeavor and public health. He has been Commissioner of Public Charities for the City of New York, Director of the American Red Cross in France (1918), Director of Extension Work, Army Educational Corps with rank of Brigadier General, Executive Director of Milbank Memorial Fund, and Administrative Consultant to the heads of the Work Progress Administration and National Youth Administration (1935-1939). For many years he has been an author and lecturer and has an outstanding reputation, national and international, in his professional field.

9. Plaintiff M. WALTER PESMAN has been the Chairman of the DENVER COUNCIL and is presently a member of its Executive Board. He is a landscape architect and land planner, whose services have been in demand as a consultant on public landscape and planning projects and has frequently taught courses in his professional field in a number of universities. He is widely-known as a speaker and lecturer.

10. Plaintiff CORLISS LAMONT, was formerly Chairman of the NATIONAL COUNCIL and is presently a member of the Board of Directors. He is a well-known author and lecturer.

4 11. Since its inception in February, 1943, the NATIONAL COUNCIL has carried on programs of

educational activities in the furtherance of its objectives, through the exercise of speech, press, assembly, association and petition, as more particularly set forth in paragraphs 14 to 19 hereof.

B. DEFENDANTS

12. Defendant TOM C. CLARK is the Attorney General of the United States and has his principal office in the District of Columbia.

13. Defendant SETH W. RICHARDSON is the Chairman of the Loyalty Review Board of the Civil Service Commission, and defendants GEORGE W. ALGER, JOHN HARLAN AMEN, HARRY A. BIGELOW, AARON J. BRUMBAUGH, JOHN KIRKLAND CLARK, CLEM W. COLLINS, HARRY W. COLMERY, BURTON L. FRENCH, META GLASS, EARL G. HARRISON, GARRETT HOAG, WILBUR LA ROE, JR., LAWRENCE T. LEE, ARTHUR W. MAC MAHON, CHARLES E. MERRIAM, HENRY PARKMAN, JR., MURRAY SEASON-GOOD, HARRY L. SHATTUCK, MRS. HARPER SIBLEY and JAMES F. TWOHY, are the other members of that Board. The Loyalty Review Board has its principal office in the District of Columbia.

IV. *Activities of Plaintiffs and Rights Affected*

14. The NATIONAL COUNCIL has caused to be prepared numerous exhibits dealing with various aspects of life in the Soviet Union. These exhibits consist of posters, water colors, photographs, other art material and models of various kinds all accompanied by suitable texts. The NATIONAL COUNCIL also exhibits Soviet newspaper and book collections. These exhibits were widely circulated throughout the United States in cooperation with leading museums, libraries, schools and colleges. On occasion exhibits of similar material depicting life and culture in the United States were prepared and transported to the Soviet Union for exhibition purposes.

15. The NATIONAL COUNCIL has prepared and caused to be published, sold and circulated numerous pam-

phlets dealing with various aspects of life in the Soviet Union and studies on international relations involving the Soviet Union and the United States. It has also published statements of leading Americans and Soviet citizens including those of high standing in governmental, diplomatic, military, industry and trade union fields, dealing with relations between the Soviet Union and the United States, and stressing as a central theme the need for the development of American-Soviet friendship as a prime requisite for world peace. It has issued many press releases on

5 these various subjects. The NATIONAL COUNCIL has sold and circulated many books and pamphlets, published in the United States by persons not connected with the NATIONAL COUNCIL. The NATIONAL COUNCIL has participated in the distribution of motion picture films and other photographic material dealing with life and culture in the Soviet Union. It has issued factual material and analyses answering anti-Soviet propaganda designed to disrupt American-Soviet relations and to divide the United Nations.

16. The NATIONAL COUNCIL has maintained a speakers bureau, providing speakers for many meetings held throughout the United States. The addresses of these speakers covered a wide variety of subjects such as: Soviet culture and science, the nationalities of the Soviet Union, mother and child care, the economic, educational and political structure of the Soviet Union and American-Soviet relations. Such speakers on occasion spoke directly under auspices of the NATIONAL COUNCIL, at other times under auspices of affiliates including the DENVER COUNCIL. Addresses were delivered before colleges, women's groups, nationality groups, churches and service clubs including the Kiwanis, Rotary and Chamber of Commerce.

17. The NATIONAL COUNCIL has conducted, initiated, sponsored and cooperated in numerous public meetings and discussions dealing with various aspects of Soviet life and American-Soviet cooperation, including public

mass meetings attended by thousands of persons, at which high ranking government, diplomatic and military officials of the United States, and the U. S. S. R., leading American business men, trade union officials, and others prominent in public life have delivered addresses on the subject of American-Soviet relations. On occasion such meetings were broadcast on national and local radio hook-ups. Messages to the meetings were received from important persons in public life, including Presidents of the United States. At such meetings, resolutions were adopted petitioning for governmental action in the field of American-Soviet relations based on the exigencies of the particular occasion.

18. The NATIONAL COUNCIL has initiated and sponsored a number of professional, scientific and cultural committees, participated in by outstanding American individuals in particular fields, including committees on music, art, dance, architecture, theatre, science and education, and a special committee of women. These committees have held numerous educational meetings, forums, conferences, con-

6. certs and art exhibitions, which were widely attended, at which various aspects of American and Soviet culture were discussed and considered and at which, on occasion, American governmental officials participated. On occasion these committees, aided directly by the executive staff of the NATIONAL COUNCIL sponsored the exchange of artists and experts and of cultural and scientific material between the United States and the Soviet Union, published such material in the United States, and caused messages to be exchanged between such groups and individuals in each country as tokens of understanding and friendship. Two of these committees, namely: the committees on science and music, have for some time existed independently of the NATIONAL COUNCIL.

19. The NATIONAL COUNCIL has from time to time published various publications, entitled "The Reporter", "Facts" and "Report on the News". These publications have provided facts concerning the life and activities of the

people of the Soviet Union. They have provided also analyses and comment upon current American Soviet relations. Their purposes have been to increase understanding of the Soviet Union and to achieve an American policy for peace based on American-Soviet cooperation thus safeguarding the interests and security of the people of the United States.

20. The NATIONAL COUNCIL still is engaging in, and intends to continue, the activities described in the preceding paragraphs hereof.

21. In connection with the activities hereinbefore set forth, the NATIONAL COUNCIL has expended large sums up to approximately \$100,000 per annum. The expenditures include the payment of a staff, maintenance of its office, the preparation and publication of its pamphlets and other literature, the preparation of its exhibits, conduct of its mass meetings, conferences, forums and other expenditures to facilitate the exercise of the constitutional rights described in paragraph 11 hereof. The money required to carry on the said activities was generally received by direct public appeal and contribution from American organizations and individuals who were in sympathy with the objectives of the NATIONAL COUNCIL and, in very substantial amount, through collection and solicitations at the meetings and other events hereinbefore described as well as through large public dinners at which addresses were made on the subject of American-Soviet relations and on the need for supporting the educational activities of the NATIONAL COUNCIL.

7 22. All the plaintiffs herein, and the members of the NATIONAL COUNCIL and of the DENVER COUNCIL have participated in activities of the NATIONAL COUNCIL, and in exercise of the rights described in paragraph 11 hereof, and in contributing and soliciting the funds expended by the NATIONAL COUNCIL in connection therewith and intend to continue such participation. The officers and members of the DENVER COUNCIL par-

ticipate particularly in activities of the kind heretofore described within Denver and its vicinity, and obtained support and financial assistance from the public in that area.

23. In all its activities the NATIONAL COUNCIL has sought to further the best interests of the American people by lawful, peaceful and constitutional means. It has never in any way engaged in any conduct or activity which provides any basis for it to be designated as "totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means".

8 V. *Acts of Defendants Complained of*

24. On or about March 25, 1947, the President of the United States issued Executive Order No. 9835, which is still outstanding.

25. Said Executive Order provides generally, for "loyalty investigation" of civilian employees in the Executive Branch of the Federal Government and of applicants for civil employment in the Executive Branch of the Federal Government.

26. Part III, section 1 of said Executive Order No. 9835 provides for the establishment of a Civil Service Commission Loyalty Review Board and pursuant thereto such a Board was established and the chairman and members thereof appointed by the President of the United States on or about November 8, 1947, all being defendants herein.

27. Part III, section 3 of the Executive Order provides:

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive,

or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

28. Part V, section 2 provides in part as follows:

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

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f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

29. On or about November 24, 1947, and again on or about May 28, 1948, the defendant, TOM C. CLARK, furnished to the Loyalty Review Board a list of organizations purportedly designated by him under Part III, section 3 of Executive Order No. 9835. Included in the list was the plaintiff, the NATIONAL COUNCIL.

9 30. The NATIONAL COUNCIL never received any advance notice that it would be listed as aforesaid. The listing by the Attorney General did not in any way indicate in which of the various categories of Part III, section 3 of the Executive Order the NATIONAL COUNCIL was deemed to fall, thus failing to comply with the provisions of the Executive Order.

31. The defendant, TOM C. CLARK, listed the NATIONAL COUNCIL as aforesaid without making an "ap-

propriate investigation and determination", as required by Part III, section 3 of the Executive Order.

32. On December 6, 1947, and again on December 22, 1947, and on January 23, 1948, the NATIONAL COUNCIL requested of defendant, TOM C. CLARK, in writing that he furnish the particulars on which he had based his conclusions and that he afford the NATIONAL COUNCIL a public hearing at which it could refute his unfounded charges. On February 10, 1948, the Assistant to the Attorney General replied as follows:

Reverend William Howard Melish
National Chairman
National Council of American-Soviet Friendship, Inc.
114 East 32nd Street
New York 16, New York
Dear Reverend Melish:

This will acknowledge your various letters to the Attorney General with respect to the designation of your organization as within Executive Order No. 9835.

You will observe that the Executive Order contains neither provision nor authorization for any of the procedural steps to which you have referred.

Yours sincerely,

(signed) Peyton Ford

The Assistant to the Attorney General

33. On or about December 4, 1947, and again on or about May 28, 1948, the Loyalty Review Board unlawfully released for publication in the press of the nation the aforesaid listings of the Attorney General, which included the name of the NATIONAL COUNCIL. These listings received wide and repeated publicity in practically every newspaper in the country and in magazines and on the radio.

34. The aforesaid listings have been used by numerous commentators and editorial writers, addressing millions of people by press and radio, to injure the reputation of the NATIONAL COUNCIL, its officers, and members.

These persons have, using these listings as their basis, repeatedly declared through such media that the NATIONAL COUNCIL has been officially found to be "subversive" and "disloyal" and as advocating the overthrow of the government by force and violence".

35. The aforesaid actions of the defendants have been arbitrary, capricious, contrary to law, in excess of statutory right and authority. Such actions have violated the rights of the plaintiffs guaranteed by the First and Fifth Amendments to the Constitution and are contrary to the Ninth and Tenth Amendments.

36. Part III, section 3 and Part V, section 2 of the Executive Order 9835, on their face and as construed and applied, violate the First, Fifth, Ninth and Tenth Amendments to the Constitution, constitute an invalid delegation of power and provide for an unconstitutional imputation of guilt by association and under vague standards. The Executive Order permits and encourages the Attorney General to outlaw and stigmatize organizations, frustrate their work and punish their members, depending solely on his whim and caprice.

VI. *The Damage*

37. As a result of the aforesaid actions of the defendants, the plaintiffs have been subjected to villification and vituperation, have been damaged in their personal and professional reputations, have had their right to speak and assemble and to carry on their activities obstructed and hampered, have had their right to work with and for the NATIONAL COUNCIL and its objectives, seriously impaired and have suffered great pecuniary loss.

38. The NATIONAL COUNCIL and the DENVER COUNCIL and its other local councils have, as a result of the aforesaid actions of the defendants, lost numerous members, officers and sponsors; lost public support; lost contributions; lost attendance at meetings; lost circulation of their publications; lost acceptance by colleges,

schools and organizations of their exhibits and other material; have been denied meeting places; have been denied radio time. The NATIONAL COUNCIL and the DENVER COUNCIL are unable to get members and support from federal employees, whose employment would be jeopardized by such membership or support. The work and activities of the NATIONAL COUNCIL have been seriously frustrated and unduly burdened thereby.

39. As a result of the aforesaid activities of the defendants, and a publicized demand by Senator Ball of Minnesota based on the aforesaid listings of defendant CLARK, the U. S. Treasury Department notified the NATIONAL COUNCIL and the public generally, 11 including past and prospective contributors to the NATIONAL COUNCIL, that the Treasury would no longer recognize that the NATIONAL COUNCIL, its affiliates, and contributors were entitled to tax exemption because of the educational purposes to which it was devoted. As a result, the NATIONAL COUNCIL and its affiliates have lost large sums of money which they would otherwise have received as contributions. The right of contributors to continue to claim and receive tax exemption has been unduly burdened.

40. As a result of the aforesaid activities of the defendants, the individual plaintiffs who, as leaders of the NATIONAL COUNCIL, are inevitably identified with the defendant CLARK's aforesaid listings, have in addition to incurring the damages heretofore recited, been damaged as follows:

(a) Plaintiff, REV. MELISH has been attacked by the vestry of his congregation who have sought support of the congregation in seeking his removal as Assistant Rector of the Church of the Holy Trinity, based on the listings of the NATIONAL COUNCIL by the Attorney General, and his congregation is involved in a violent, bitter and high publicized controversy concerning this effort to remove him.

(b) Plaintiff RICHARD MORFORD has been hampered in the performance of his duties as the chief executive officer of the NATIONAL COUNCIL and his right to perform his employment, from which he receives his livelihood, free from the stigma arising from the listings of the NATIONAL COUNCIL aforesaid.

(c) Plaintiff HENRY PRATT FAIRCHILD has had his prestige and standing as a lecturer impaired and has lost bookings and suffered cancellations. Many organizations fear to use his services because of the aforesaid listings. He has thus suffered considerable financial damage.

(d) The demand for plaintiff KINGSBURY as a lecturer on public health and welfare matters has been greatly impaired.

(e) Plaintiff M. WALTER PESMAN has been deprived of a number of commissions from public bodies as a landscape architect and land-planner, has had various contracts for his services cancelled, and has lost his teaching position at the University of Denver. Various of his speaking engagements have been cancelled. His livelihood has been seriously jeopardized and threatened.

(f) The acceptance by the public of plaintiff CORLISS LAMONT as a lecturer and authority in his specialized fields has been impaired.

12 41. As a result of the aforesaid activities of the defendants, all individual plaintiffs and all members and supporters of the NATIONAL COUNCIL and the DENVER COUNCIL have been deprived of their right to associate in the activities of the NATIONAL COUNCIL free from the taint imposed by the defendants by the listings aforesaid, and they have also had impaired their opportunities for public and private employment. A number of the individual plaintiffs herein have been employed by the United States government and by various state and governmental authorities. Because of their expert professional knowledge, said plaintiff had reasonable expectancy of similar employment in the future which expect-

tancy has been impaired if not destroyed by the actions of the defendants.

42. As a result of the aforesaid acts of the defendants, the plaintiffs have suffered, are suffering and will continue to suffer, serious and irreparable injuries for none of which do they have an adequate remedy at law.

VII. *Relief Sought*

Wherefore, plaintiffs demand:

(1) That the defendant TOM C. CLARK, individually and as Attorney General, be enjoined from keeping in effect the listing or designation of the NATIONAL COUNCIL purportedly made pursuant to Executive Order 9835.

(2) That the said defendant be enjoined from making under said Executive Order, any designation with respect to the NATIONAL COUNCIL, the DENVER COUNCIL or its other affiliates.

(3) That the said defendant be ordered to notify the Loyalty Review Board that membership in or affiliation with the NATIONAL COUNCIL by federal employees cannot be considered by the Board as relevant to matters within its jurisdiction.

(4) That all the defendants be enjoined from taking any action which may be based upon the inclusion of the NATIONAL COUNCIL'S name in any listings or designations under Executive Order 9835.

(5) That the defendants be ordered to release publicly a statement that the name of the NATIONAL COUNCIL has been withdrawn from the aforesaid listing of the Attorney General.

13 (6) That a declaratory judgment be entered declaring the aforesaid actions of the defendants illegal, and further declaring that Part III, section 3 and Part V, section 2 of Executive Order 9835 are unconstitutional.

(7) And such other and further relief as may appear just and proper.

14 Filed Aug 20 1948 Harry M. Hull, Clerk

Defendants' Motion to Dismiss the Complaint

Now come the defendants and move the Court to dismiss this action on the grounds that:

1. There is no present justiciable controversy between the parties hereto.
2. The complaint fails to state a claim against the defendants upon which relief can be granted.

In support of this motion, the Court is respectfully referred to defendants' Memorandum of Points and Authorities attached hereto.

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15 Filed Feb 1 1949 Harry M. Hull, Clerk

Opinion of the Court

The plaintiff, a non-profit corporation, together with a similar corporation associated with it, and certain individuals who are also connected with it, seek to enjoin the defendants, the Attorney General and the members of the Loyalty Review Board, both in their respective official capacities and as individuals, from keeping in effect the listing or designation of the plaintiff corporations as "subversive." The Attorney General, pursuant to an Executive Order of the President issued by him pursuant to the Civil Service Act of 1883 (22 Stat. 403) as amended, and section 94 of the Act of August 2, 1939 (18 U. S. C. 611), addressed a letter to the Chairman of the Loyalty Review Board of the Civil Service Commission, listing certain organizations and groups, including the plaintiff corporations, determined by him to fall within the description of Part III, par. 3 of the said Executive Order as totalitarian, fascist, communist, or subversive. This letter also stated that membership in, affiliation with or sympathetic association with, any organization designated, is simply one piece of evidence which may or may not be helpful.

The plaintiffs claim that they are injured by the designation of the plaintiff corporations as subversive; that they have lost members and officers; public support, contributions, etc.; that one of the plaintiff corporations has lost its tax exempt status; that the individual plaintiffs have been damaged in their personal reputations, have lost their right to assemble and speak, etc.

Of course so far as the tax status of the plaintiff corporations is concerned, the letter of the Attorney General has no effect; that status is determined by the law or the tax authorities.

None of the plaintiffs are employees of the United States and it is not apparent that any of them will seek that employment. The letter of the Attorney General is simply one of advice to various administrative agencies, and any indirect effect it might have upon the plaintiffs does not constitute legal damage. The finding of the Attorney General in any event is not conclusive and may be reviewed by any one who is legally entitled to be heard, whether an employee of the United States or one seeking that employment. The letter of the Attorney General can in no way subject the plaintiffs to any civil or criminal liability. See *Standard Scale Co. v. Farrell*, 249 U. S. 571; *U. S. v. Los Angeles S. L. R. Co.*, 273 U. S. 299.

I am satisfied that the Attorney General, acting for the President, cannot be restrained from giving such information as he may have to the various administrative agencies as to organizations which, in his opinion, are engaging in activities that operate against the maintenance of the Constitution and the welfare of the country.

So far as the liability of the defendants as individuals are concerned, there can be no question of their immunity. See *Spalding v. Vilas*, 161 U. S. 483, and the recent case of *Glass v. Ickes*, 73 App. D. C. 3.

The motion of the defendants to dismiss the bill will be sustained.

I may add that this same action has been taken in this court recently in two cases involving the same question of law. See *Joint Anti-Fascist Refugee Committee v. Clark*, and *Citizens Protective League, Inc. v. Clark*, (Civil Action No. 2329-48).

Jennings Bailey
United States District Judge

17 Filed Feb 8 1949 Harry M. Hull, Clerk

Order

The above cause, having come on for hearing on January 4, 1949, on the defendants' motion to dismiss the complaint; the Court having heard argument of counsel; the Court having considered the memoranda filed herein; and in accordance with the memorandum opinion filed by the Court on the 1st day of February 1949, it is hereby:

ORDERED, That the defendants' motion to dismiss be and hereby is granted; and it is further

ORDERED, That the complaint in the above-entitled cause be and hereby is dismissed with prejudice.

Jennings Bailey
United States District Judge

[fol. 20] [Stamp:] United States Court of Appeals for the
District of Columbia Circuit. Filed Oct. 25, 1949.
Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT, OCTOBER TERM, 1949

No. 10,165

NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, INC.,
et al., Appellants,

v.

TOM C. CLARK, Individually and as Attorney General of
the United States, et al., Appellees

Before: Clark, Wilbur K. Miller and Proctor, Circuit
Judges

ORDER

This cause came on for consideration on the transcript
of record from the District Court and on appellants' motion
to decide the case without oral argument, and on appellees'
motion to affirm the judgment of the District Court, and
appellants' answer thereto.

On Consideration Whereof, It is Ordered by the Court
that both of the above-described motions be granted, and
that the order of the District Court on appeal herein be,
and it is hereby, affirmed on the authority of No. 10,002,
Joint Anti-Fascist Refugee Committee v. Clark, decided
by this Court August 11, 1949.

Per curiam.

Dated October 25, 1949.

[fol. 21] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Oct. 27, 1949. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, OCTOBER TERM, 1949

No. 10,165

NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, INC.,
et al., Appellants,

vs.

TOM C. CLARK, Individually and as Attorney General of the United States, et al., Appellees

ORDER

On consideration of the appellants' motion to substitute J. Howard McGrath, Attorney General of the United States, as a party appellee herein in the place and stead of Tom C. Clark, who ceased to hold office as Attorney General of the United States on or about August 24, 1949, and appellants having alleged that there is substantial need for continuing and maintaining the action herein, and it appearing that J. Howard McGrath, Attorney General of the United States, consents to the motion for substitution, It is

Ordered by the Court that J. Howard McGrath, Attorney General of the United States, be, and he is hereby, substituted as a party appellee herein in the place and stead of appellee Tom C. Clark.

Per curiam.

Dated October 27, 1949.

[fol. 22] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Jan. 9, 1950. Joseph W. Stewart, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,165

NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, INC.,
et al., Appellants,

v.

J. HOWARD McGRATH, Individually and as Attorney General of the United States, et al., Appellees

DESIGNATION OF RECORD

The clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix to briefs.
2. The order affirming the decision of the District Court.
3. The order substituting J. Howard McGrath as a party appellee in the place and stead of Tom C. Clark.
4. Designation.
5. Clerk's certificate.

David Rein, Attorney for Appellants.

Certification of Service

I hereby certify that I have served the within and foregoing Designation of Record in the above-entitled cause by mailing a copy thereof, post prepaid to the Solicitor General, Department of Justice, Washington, D. C., this 9th day of January, 1950.

David Rein.

[fol. 23] UNITED STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered 1 to 22, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and the proceedings of the said Court of Appeals, as designated by counsel, in the case of: National Council of American-Soviet Friendship, Inc., et al., Appellants, v. J. Howard McGrath, Individually and as Attorney General of the United States, et al., Appellees, No. 10,165, January Term, 1950, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this eighteenth day of January, A. D. 1950.

Joseph W. Stewart, Clerk of the United States Court
of Appeals for the District of Columbia Circuit.
(Seal.)

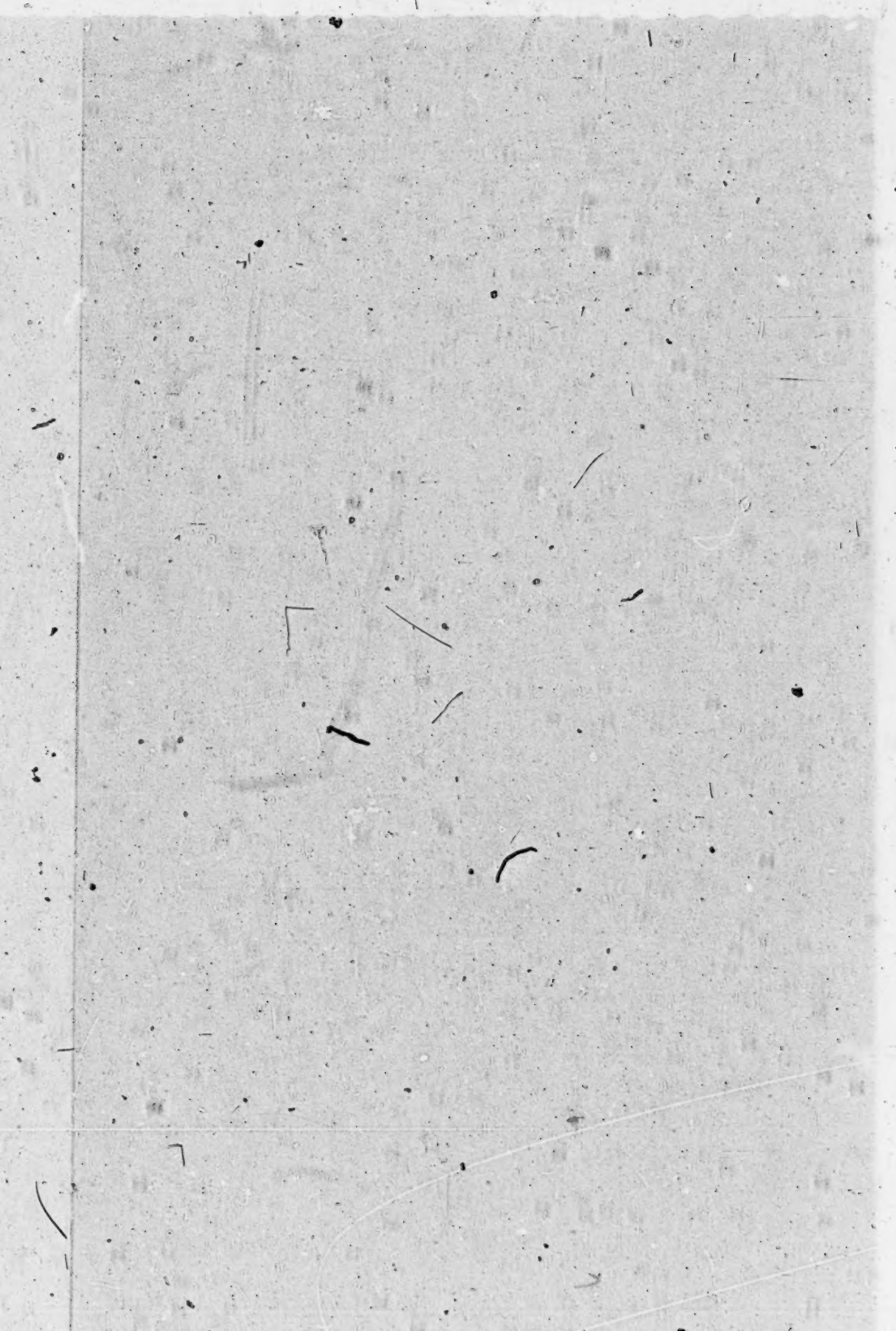
[fol. 24] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 15, 1950

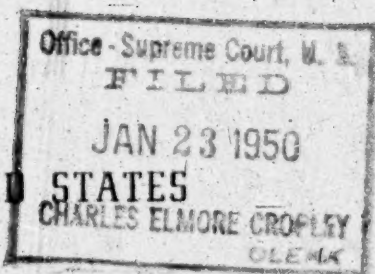
The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following Joint Anti-Fascist Refugee Committee vs. McGrath, No. 556.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1949~~

1950

No. ~~554~~ 7

NATIONAL COUNCIL OF AMERICAN - SOVIET
FRIENDSHIP, INC., DENVER COUNCIL OF AMER-
ICAN-SOVIET FRIENDSHIP, WILLIAM HOWARD
MELISH, RICHARD MORFORD, HENRY PRATT
FAIRCHILD, JOHN A. KINGSBURY, M. WALTER
PESMAN, CORLISS LAMONT,

Petitioners,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE
UNITED STATES, SETH W. RICHARDSON, CHAIRMAN
OF THE LOYALTY REVIEW BOARD OF THE UNITED STATES
CIVIL SERVICE COMMISSION, GEORGE W. ALGER, JOHN
HARLAN AMEN, ET AL., ETC.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT.

ABRAHAM J. ISSERMAN,
DAVID REIN,
JOSEPH FORER,

Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 554

**NATIONAL COUNCIL OF AMERICAN - SOVIET
FRIENDSHIP, INC., DENVER COUNCIL OF AMER-
ICAN-SOVIET FRIENDSHIP, WILLIAM HOWARD
MELISH, RICHARD MORFORD, HENRY PRATT
FAIRCHILD, JOHN A. KINGSBURY, M. WALTER
PESMAN, CORLISS LAMONT,**

Petitioners,

vs.

**J. HOWARD McGRATH, ATTORNEY GENERAL OF THE
UNITED STATES, SETH W. RICHARDSON, CHAIRMAN
OF THE LOYALTY REVIEW BOARD OF THE UNITED STATES
CIVIL SERVICE COMMISSION, GEORGE W. ALGER, JOHN
HARLAN AMEN, ET AL., ETC.**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT.**

The petitioners above-named pray that a writ of cer-
tiorari issue to review a decision of the United States Court
of Appeals for the District of Columbia, rendered October

25, 1949, affirming a judgment of the United States District Court for the District of Columbia dismissing the complaint of petitioners against the above-named respondents.¹

Opinions Below

The Court of Appeals did not file an opinion, but its order of affirmance rested on the Court's previous opinion in *Joint Anti-Fascist Refugee Committee, v. Clark*, 177 F. (2d) 79. The opinion of the District Court has not been reported. It appears at R. 17-19.

Summary Statement of Matter Involved

On June 29, 1948, the petitioners filed a complaint in the District Court for the District of Columbia seeking an injunction and declaratory judgment against the Attorney General and the chairman and members of the Loyalty Review Board of the United States Civil Service Commission (hereinafter called the Board) (R. 2, 6).

No answer to the complaint was filed. Respondents filed a motion to dismiss the complaint (R. 17), which was granted (R. 19). Accordingly, the allegations of the complaint must be taken as true for present purposes.

The allegations of the complaint (R. 2-16) are summarized as follows.

Executive Order 9835 establishes an employees loyalty program in the executive branch of the federal government. Section III(3) of the Order requires the Attorney General to supply to the Board the names of organizations designated by him, after appropriate investigation and determination, as "totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny

¹ The complaint originally named Tom C. Clark, Attorney General, as a defendant. Respondent McGrath was substituted by order of the Court of Appeals (R. 21).

others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

The Board is required to disseminate this information to the various federal departments and agencies for use in proceedings to determine whether applicants for federal employment shall be denied employment and whether federal employees shall be dismissed on the basis that "reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States" (Ex. Order, III (3) (a), V (1)). Thus in determining this issue, the adjudicating bodies consider the employee's or applicant's "membership in, affiliation with or sympathetic association with" any organization on the Attorney General's "subversive list" (id., V(2) (f)).

In November 1947 and May 1948, the Attorney General furnished the Board a list of organizations so designated by him, and included therein the name of petitioner National Council of American-Soviet Friendship, Inc. (hereinafter called the National Council) (R. 11). The National Council had never received any advance notice that it would be so listed, and the Attorney General had not made an "appropriate investigation and determination," as required by the Executive Order, prior to listing the National Council (R. 11, 12). The National Council requested the Attorney General for the particulars on which he had based his conclusion and for a hearing at which it could refute his charges. The Attorney General refused on the grounds that such procedures were not authorized by the Executive Order (R. 12).

In December 1947 and May 1948, the Board released for publication the listing of the Attorney General, which included the name of the National Council. This listing received wide and repeated publicity throughout the country (R. 12).

The National Council is a non-profit membership corporation, whose purpose is "to strengthen friendly relations between the United States and the Union of Soviet Socialist Republics by disseminating to the American people educational material regarding the Soviet Union, by developing cultural relations between the peoples of the two nations, and by combating anti-Soviet propaganda designed to disrupt friendly relations between the peoples of these nations and to divide the United Nations" (R. 4). It engages in numerous activities to further these purposes, including exhibition, circulation and publication of materials and literature dealing with life in the Soviet Union, maintaining a speakers' bureau, holding of public meetings, etc., many of which involve cooperation with museums, libraries, schools and other organizations (R. 6-9). It has expended large sums up to approximately \$100,000 per annum, to finance its activities, including the maintenance of a staff and office, preparation of literature and other materials, etc. (R. 9). Its revenues have been generally derived by contributions from organizations and individuals in sympathy with its objectives and largely through collections at meetings (*ibid*).

The National Council has never engaged in any conduct or activity which provides any basis for it to be designated as "totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts by force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means" (R. 10).

The Denver Council of American-Soviet Friendship, also a petitioner, is one of the affiliates of the National Council (R. 4). The individual petitioners are officers or directors of the National Council or the Denver Council (R. 4, 5).

As a result of the actions of respondents in listing and

publicizing the National Council as a "subversive" organization² and in using the listing in the loyalty program, the National Council's activities have been seriously hampered and it has suffered great pecuniary loss. Thus the National Council and its affiliates, including the Denver Council, have lost numerous members and officers, lost public support and contributions, lost attendance at meetings, lost circulation of their publications, lost acceptance by schools and organizations of their material, have been denied meeting places and radio time, and are unable to get members and support from federal employees. In addition, the listing caused the Treasury to rule publicly that contributions to the National Council and its affiliates will no longer be recognized as tax-exempt contributions to educational institutions, with the result that the National Council and its affiliates have lost large sums of money which they would otherwise have received as contributions (R. 13, 14).

Serious damage has also been caused to the individual petitioners by respondents' actions. Rev. Melish's position as Assistant Rector of the Church of the Holy Trinity has been jeopardized. Morford has been hampered in the right to perform his duties and employment (from which he receives his livelihood) as chief executive of the National Council. Fairchild, Kingsbury and Lamont are lecturers, and have lost bookings and had their professional standing impaired. Pesman has lost commissions, as an architect for public bodies has had contracts cancelled, and has lost his teaching position at a university (R. 15). In addition, the individual petitioners and all members and supporters of the National Council have been hampered in their right to associate in the activities of the Council and have had their opportunities for public and private employment impaired

² We use the word "subversive" henceforth as including any or all of the categories referred to in section III(3) of Executive Order 9835--i.e., "totalitarian, fascist, communist, subversive," etc.

(R. 15, 16). The reputations of petitioners have been damaged and they have been subjected to vilification and harassment (R. 12, 13).

The complaint alleged that the actions of the respondents were unconstitutional and in excess of any statutory authority (R. 13), and that Part III, section 3 and Part V, section 2 of Executive Order 9835 are unconstitutional as construed and applied by the Attorney General (*ibid.*). The relief sought included a declaratory judgment to this effect and an injunction restraining the respondents from keeping in effect the listing of the National Council or taking any action on the basis thereof (R. 16).

The judgment of the District Court dismissing the complaint was affirmed by the Court of Appeals for the District of Columbia on October 25, 1949. It rendered no opinion in the case, but its order (R. 20) relied on its opinion in *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F(2d) 79. That opinion, however, was not addressed to the arguments, which are relied upon herein and which were contained in petitioners' brief filed in the Court of Appeals urging reversal of the decision of the District Court.

Statement as to Jurisdiction

The judgment of the Court of Appeals was entered on October 25, 1949 (R. 20). The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254.

Executive Order Involved

Executive Order 9835, 12 F. R. 1935, issued March 21, 1947, entitled "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government" provides in part as follows:

Part III, Sec. 1

There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three im-

partial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

Part III, Sec. 3

The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the

commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

Part V

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States.

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

Questions Presented

(1) Whether the petitioners or any of them may challenge the constitutionality of the actions of the respondents in listing the National Council as a subversive organization, contrary to fact and without appropriate investigation and without ordinary due process procedures, in publicizing that listing, and in applying the listing in passing on the eligibility of persons having or seeking government employment, when such actions have seriously impaired the rights of petitioners to speak and assemble, have defamed their reputation, and have caused them serious financial loss, as described in the complaint.

(2) Whether the action of the Attorney General in designating the National Council, contrary to fact, as a "subversive" organization for the purposes of Executive Order 9835 is in excess of the executive power conferred by the Constitution, and in violation of the Ninth and Tenth Amendments.

(3) Whether such action of the Attorney General violates the Fifth Amendment as having been taken without procedural due process of law.

(4) Whether the described actions of respondents abridge petitioners' freedoms of speech and assembly in violation of the First Amendment.

(5) Whether petitioners' complaint stated a claim upon which relief can be granted.

Reasons for Granting the Writ

The writ should be granted because (1) the issues involved have not heretofore been determined by this Court; (2) they are of great public importance; (3) they are of great constitutional significance; (4) the decision below contravenes principles established by decisions of this Court. In what follows, we develop these reasons further.

1. THE GENERAL NATURE OF THE ISSUES PRESENTED

This case presents another application of the growing tendency of the making of administrative decisions which seriously impair individual liberties, and which are made without procedural safeguards and on the basis of secret evidence locked in the bosom of the administrator and never susceptible of rebuttal by those affected. Such administrative decisions, the omission of procedural standards, and the reliance on undisclosed evidence, are all invariably justified by a claim of the needs of "internal security." With reference to this claim Justice Jackson spoke as follows: (dissenting in *United States ex rel. Knaufl v. Shaughnessy*, No. 54 of this Term)

Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace to free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary oppressions on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddling, and the corrupt to play the role of informer

undetected and uncorrected. Cf. *In re Oliver*, 330 U. S. 257, 268.

This case goes even further than *Knauff's* case. Here is involved not the enjoyment of a privilege conferrable by the sovereign at will, but the exercise of constitutional rights of free speech and assembly which are the core of our democratic system. Here the action rests on no statute. Indeed, the Attorney General's designation is, under the complaint, in violation of an Executive Order and of a statute.

Here the court below refused even to concede those aggrieved any standing to challenge action alleged as being unconstitutional and beyond and in violation of statutory authority. It has thus created a doctrine that constitutional rights may be freely infringed provided the infringement is accomplished by sophisticated procedures.

Here the respondents urged below, and the court sustained the contention, that actions of the federal executive are not subject to judicial review so long as they claim "security" considerations (see *Joint Anti-Fascist Refugee Committee v. Clark*, *supra*, at 82). It has thus created a doctrine at variance with the historic theories that our Constitution confers only limited powers and that a system of checks and balances is available to curtail abuse of power and ultra-vires action.

It does not take a lawyer to understand the significance of what is involved here. In an editorial of the Washington Post for July 1, 1948, the following comment appeared with respect to the respondents' actions against the petitioners:

From the moment that the loyalty review program was first promulgated by executive order this newspaper has condemned the absolute power conferred by it upon the Attorney General to single out voluntary associations of American citizens and stigmatize them

as disloyal. The power amounts in effect to a power to proscribe and destroy. . . .

If men may not join hands to espouse ideas which are unpopular then the constitutional guarantee of free speech and free association are mere myths. It is wholly on account of the currently unfashionable opinions which it advocates and not on account of any illegal or even improper acts that the Council of American-Soviet Friendship has been branded subversive by the Attorney General. To permit the Attorney General to place such a brand upon any group for the mere advocacy of ideas is to permit him to silence all dissent.

If the Attorney General can put the Council of American-Soviet Friendship outside the pale of decency by an arbitrary designation of it as disloyal, he can do the same in respect of any religious, political or social organization advocating unorthodox or unconventional beliefs. This is a power incompatible with a government of laws. It is a power irreconcilable with freedom.

The court below has held that the respondents may outlaw organizations and their members because they exercise their rights to speak and assemble. It has held that this outlawry may be accomplished without a hearing on the basis of false evidence clandestinely assembled and never exposed. It has held that the petitioners cannot be injured by being so outlawed, although the complaint, which must be taken as true, alleges extensive and irremediable harm. It has held that associations and individuals have no recourse against defamation by government officials acting outside the law and serving no governmental purpose. These holdings do not rest on an overwhelming compulsion of legal principles as amply appears from the dissent of

Judge Edgerton in the *Joint Anti-Fascist* case, *supra*, 177 F. (2d) at 84-91. These holdings cry for review by this Court.

2. THE "NO JUSTICIABLE CONTROVERSY" HOLDING

The primary ground of decision below, as shown by the opinion of the District Court and that of the Court of Appeals in the *Joint Anti-Fascist* case, *supra*, was that petitioners could not maintain the action because there was no "justiciable controversy." The theory of this holding was that the Attorney General's designation "imposes no obligation or restraint," "commands nothing" of the National Council, denies it "no authority, privilege, immunity or license," and subjects it to "no liability." *Joint Anti-Fascist* case, *supra*, 177 F. (2d) at 82.

Petitioners' theory is that respondents' actions and the relevant sections of Executive Order 9835 as construed by the Attorney General are invalid as being in excess of the power of the Executive and as violating the First, Fifth, Ninth and Tenth Amendments. Petitioners urge that these invalid actions have damaged interests of petitioners which are protected by the First and Fifth Amendments, as well as interests which are judicially protected against ultra vires actions of government officials.

It seems plain that the extent of protection afforded to various interests by different constitutional provisions and rules of law will differ with the several provisions and rules involved. The courts below, however, adopted a broadside rule to the effect that no interest is legally protected against harm caused by publication of administrative findings.

But this is an absurd generalization. The cases relied on by the courts below ruled that the due process clauses of the Fifth and Fourteenth Amendments protect only against governmental action which is at least "regulation," that mere publication of administrative findings is not "regu-

lation.”³ All these cases did was to construe the words “shall be deprived” in the due process clauses as extending only to action which is at least “regulation” (i.e., which commands or restrains action or creates liability) and not merely publication of findings. They did not and could not decide that constitutional provisions other than the due process clause do not protect certain interests against harm from action which is less than “regulation.” In all common sense, it is necessary to explore each case with respect to the particular interest involved and the source of protection claimed.

It is perfectly apparent that most actions maintained against the federal government or its agents are to vindicate common-law rights, as those against breaches of contract or torts, and not for damage caused by “regulation.” If the sovereign’s immunity has been waived or otherwise eliminated, these actions are not dismissed as presenting “no justiciable controversy” merely because they do not involve regulation or direction of the plaintiff.

In *Larson v. Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 704, this Court stated: “Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of the officers of the Government, . . . courts have the power to grant relief against these actions.” In *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U. S. 56, this Court held that equity relief was available if an administrative agency threatened to commit harm (to com-

³ Both *Standard Scale Co. v. Farrell*, 249 U. S. 571 and *United States v. Los Angeles & S.L.R. Co.*, 273 U. S. 299 involved claims of deprivation of property without due process of law. *Employers Group v. National War Labor Board*, 143 F. (2d) 145, Cert. den. 323 U. S. 735 and *National War Labor Board v. U. S. Gypsum Co.*, 145 F. (2d) 97, Cert. den. 324 U. S. 856, held that an unenforceable “directive” which creates no legal liabilities is not “deprivation” of property for due process purposes, merely because it might subsequently induce the President to seize property (an action which would be such “deprivation”).

mon-law interests) merely by publishing, in excess of statutory authority, confidential business information. The Court of Appeals of the District of Columbia has itself held to like effect in a case in which the distraction of spurious pleas of "security" was absent. *Bank of America National Trust & Savings Ass'n v. Douglas*, 105 F. (2d) 100; cf. *American Sumatra Tobacco Corp. v. SEC*, 93 F. (2d) 236. In these cases "regulation" was not necessary because the rights enforced were not derived from the due process clause.

In what follows we shall see that petitioners' complaint alleges harm to interests which are legally protected against damage by publication of administrative findings. We shall also see that for due process purposes the actions of respondents were in fact "regulation" within principles established by this Court.

3. VIOLATION OF FIRST AMENDMENT RIGHTS⁴

a. *The First Amendment prohibits abridgment of expression and assembly by publication of administrative findings.*

The First Amendment creates rights against any harm by governmental action to the freedoms described in the Amendment. Accordingly, the freedoms of speech, press and assembly are protected against any governmental action which in fact restrains or interferes with ("abridges") them, including interference accomplished by the mere publication of administrative findings.

Whether or not the respondents' actions have abridged the freedoms of petitioners protected by the First Amend-

⁴ It is unnecessary to argue that the First Amendment restricts actions of the federal executive. *Ex parte Endo*, 323 U. S. 283. It is also, of course, applicable to the judicial branch. *U. S. v. Ballard*, 322 U. S. 78. Obviously the executive, who is clearly bound by the First Amendment when carrying out a legislative mandate, cannot free himself from its restrictions merely by acting without or in defiance of legislative authorization.

ment is thus essentially a factual issue. The complaint, whose allegations must be taken as true, alleges that the respondents' actions did and does abridge these freedoms of the petitioners and sets out in some detail the factual nature and extent of the abridgement. Even aside from the allegations of the complaint it is perfectly evident that the respondents' actions must necessarily have the effect of abridging petitioners' rights under the First Amendment.

Since the complaint clearly and factually alleges that the respondents abridged (i. e., interfered with) the rights of the petitioners guaranteed by the First Amendment, that should put an end to the question as to whether the complaint states a cause of action. If the government takes issue with the facts alleged, and maintains that the respondents did not interfere with the petitioners' rights under the First Amendment, that is an issue to be raised by answer and resolved by a trial. It cannot be raised by a motion to dismiss.

But despite the clear allegations of the complaint, the opinion of the District Court indicated that the abridgement of petitioners' rights under the First Amendment was "indirect," "and any indirect effect it might have upon the plaintiffs does not constitute legal damage" (R. 18).⁵ But there is no warrant, in the light of the allegations of the complaint, for any assertion that the abridgement of petitioners' rights was "indirect." Neither does the First Amendment recognize a distinction between "indirect" and "direct" abridgement of the rights therein guaranteed.

It is true that in the present case the petitioners' rights were not abridged by any order addressed to them and requiring them to do or refrain from doing something.

⁵ Similarly the opinion in the *Joint Anti-Fascist* case referred to the injury in that case as being "indirect". 177 F. (2d) at 83.

Rather, the harm was caused by the respondents stimulating others to take action against the petitioners; i. e., by inducing government employees to leave the organization and to refuse to attend meetings or to contribute support, by inducing members of the public to take similar action, by inducing owners of meeting places and radio stations to deny their facilities, by inducing colleges, schools and other organizations to refuse to accept the Council's publications, etc. But these interferences were the direct, and indeed the inevitable, result of respondents' actions, and so the complaint alleges.

In any event, speculation on "direct" or "indirect" consequence is immaterial. Since the First Amendment protects the rights of free speech and assembly against any governmental harm, it protects against harm caused by the government's stimulating others to harmful conduct. Thus in *Illinois ex rel. McCollum v. Bd. of Education*, 333 U. S. 203, an interest included within the First Amendment was protected against invasion by governmental disclosure of religious non-conformity resulting in embarrassment and humiliation. Similarly, protection against invasion of First Amendment liberties by a mere requirement of disclosure of identity as a labor organizer was afforded in *Thomas v. Collins*, 323 U. S. 516. In both these cases, the governmental action merely exposed persons to conduct or attitudes of other persons which had a restraining effect on the complaining parties. Yet the First Amendment was held violated.⁶ So here the petitioners have, by governmental action, been exposed to similar restraining conduct and attitudes on the part of the public. It is enough, in other words, to run afoul of the First Amendment if the government invites the commission of aggressions against

⁶ The *McCollum* case also supports our thesis that the First Amendment protects against damaging actions by government even though they do not order someone to do or refrain from doing something.

those exercising rights of speech and assembly. In the present case the invitation is coupled with governmental sanctions against support of the National Council by, at least, present and prospective government employees.

Even the Fifth Amendment, as we shall see, protects against harm caused to one person by governmental action directed against another. The First Amendment, with its preferred position (*Thomas v. Collins*, *supra* at 529, 530), can do no less.

If we must think in the terms "direct" and "indirect," employed by the courts below, it can be added that the First Amendment protects the freedoms of speech, press and assembly against such other "indirect" forms of action as denial of second-class mailing privileges (cf. *Hannegan v. Esquire*, 327 U. S. 146), the imposition of a tax (*Jones v. Opelika*, 319 U. S. 103, adopting dissents in 316 U. S. 584, 601, 610, 622), a prohibition against littering the streets (*Schneider v. Irvington*, 308 U. S. 147), and a regulation prohibiting annoyance to individuals in their houses (*Martin v. Struthers*, 319 U. S. 141).

This rule, that the First Amendment prohibits *all* abridgements of speech or press, "direct" or "indirect," is essential to the functioning of that Amendment. "It is not often in this country that we now meet with direct and candid efforts to stop speaking and publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control." Jackson, J., concurring in *Thomas v. Collins*, *supra*, at 547.⁷ Just as the Fifteenth Amendment "nullifies

⁷ Cf. the editorial in the *Washington Post*, cited *supra*: "When the Attorney General calls this group (the National Council) subversive he tells the American people, in effect, that it is anti-American and serving the interest of a foreign power. If it is actually the agent of a foreign government, then it is obliged under the terms of the Voorhis Act to register as

sophisticated as well as simple-minded modes of discrimination" (*Lane v. Wilson*, 307 U. S. 273, 275), so the First Amendment nullifies sophisticated as well as simple-minded encroachments on the freedoms of speech and assembly. Accordingly, "The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws." *Stone, J., in Jones v. Opelika*, *supra*, 316 U. S. at 609.

The only limitation upon the protections of the First Amendment which has been recognized by the courts is that of the "clear and present danger" doctrine. *Bridges v. Wixon*, 326 U. S. 135. It is unnecessary to discuss the application of that doctrine here, since no contention is raised by the government that the actions of petitioners constituted a clear and present danger, and it is clear from the allegations in the complaint setting forth the activities of petitioners that no such contention can validly be made. Accordingly, the complaint alleges that respondents are abridging interests of petitioners protected by the First Amendment, and petitioners have standing to restrain further abridgement.

b. *The abridgement of petitioners' rights under the First Amendment cannot be justified by any asserted relationship to the need for determining the loyalty of government employees or applicants.*

The opinion of the Court of Appeals in the *Joint Anti-Fascist* case, *supra*, indicated that the action in that case was justified because of some asserted relationship to a program of the Executive to insure that government employees be loyal to the government of the United States.

such with the Department of Justice and is subject to prosecution for having failed to do so. No attempt to prosecute it has been made, however. One can only conclude, therefore, that the department is attempting to accomplish by harassment and vilification what it is unable to accomplish within the law."

We do not here dispute the right of the government to discharge disloyal employees, including, for example, those who commit sabotage, espionage, treason or sedition, or who advocate the violent overthrow of government, or who are agents for foreign governments.

But the right to exclude disloyal employees has no bearing on this case. We need not consider whether petitioners' First Amendment rights can be curtailed in the interests of insuring that federal employees are loyal. However that may be, certainly their rights cannot be curtailed by actions which have no substantial relevance to such an objective. In view of the complaint's allegations as to the nature and activities of the National Council, the loyalty of federal employees is in no wise served by inhibiting them from belonging to or "sympathetically associating with" the National Council and by libelling the National Council and its members.⁸

If, arguendo, the Attorney General may designate subversive organizations for the purpose of determining eligibility for government service, certainly he has no power to designate as disloyal organizations which, like the National Council, are loyal.⁹ *Cf. Ex parte Endo*, 323 U. S. 283. It is incumbent upon the government in administering any program relating to the ferreting out and discharge of disloyal employees to develop a procedure which will accomplish this end without denying to others rights guaranteed

⁸ *Cf.* Judge Edgerton, dissenting, in the *Joint Anti-Fascist* case, *supra*, 177 F. (2d) at 86: "On the present record, appellee's ruling against appellant has no more tendency to promote the efficiency of the civil service than a similar ruling against the Republican Party or the Methodist Church would have."

⁹ In the *Joint Anti-Fascist* case, *supra*, the majority apparently considered it to be of some significance that the complaint there involved did not expressly deny that the organization fell within the subversive categories of the Executive Order. 177 F. (2d) at 81. The complaint in this case does contain such an express denial. (R. 10).

by the First Amendment.¹⁰ *Thornhill v. Alabama*, 310 U. S. 88; *Winters v. New York*, 333 U. S. 507.

The procedure employed leaves to the unfettered discretion of the Attorney General what organizations should be listed and thus stigmatized. The Attorney General's action was taken without notice or hearing, without particulars, without supporting evidence, and without the opportunity to the National Council to know the evidence against it, to cross-examine witnesses, or to present evidence on its own behalf. Further, the standards in the Executive Order, "totalitarian, fascist, communist, or subversive," are without reasonably precise meaning or content. They are not defined by the Executive Order, nor have they been defined by the Attorney General. The end result of such a procedure is that the Attorney General may list any organization which incurs his displeasure, without regard to the aims and activities of that organization, and whether the organization be loyal or disloyal. And that is exactly what he has done. The government offers no justification for such procedure, and none can be offered. Whatever may be the need to ferret out and discharge disloyal employees, the use of such arbitrary procedures and vague standards to the damage of lawful, loyal organizations and persons in the exercise of their constitutional rights of speech, press and assembly, clearly contributes nothing toward satisfying that need.

The establishment of conditions for government employment which restricts the rights of government employees

¹⁰ And all the more so if the damage caused is wholly disproportionate to the benefits sought. Contrast the harm to petitioners with the circumstance that an employee's affiliation with a branded organization "is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case" (emphasis supplied). Directive from the Attorney General to the Loyalty Review Board, transmitting list of organizations designated as subversive. 13 F. R. 9366.

to hold and express lawful beliefs and opinions on political subjects, such as those advocated by the National Council, is a violation both of the Constitution (*United Public Workers v. Mitchell*, 330 U. S. 75, 100) and of the Hatch Act, pursuant to which the Attorney General purportedly acted. That Act provides that federal employees "shall retain the right to express their opinions on all political subjects and candidates" (5 U. S. C., sec. 118i).

The decision below enables the executive to impose unconstitutional and illegal conditions for government employment and then to resist any inquiry into his illegal actions simply by making the bare, unsubstantiated assertion that he acted pursuant to the President's "right and . . . duty to protect and defend the government against subversive forces which may seek to change or destroy it by unconstitutional means" and to "protect the civil service from disloyal and subversive elements." See *Joint Anti-Fascist* case, *supra*, at 84.

4. VIOLATION OF FIFTH AMENDMENT RIGHTS

a. *The Attorney-General's determination is "regulation" for due process purposes.*

The Fifth Amendment creates a right to have certain minimum procedural standards observed when government action "deprives" a person of life, liberty or property. It is, of course, clear that "deprivation" includes "regulation" affecting (as it always does) life, liberty or property. It does not include administrative findings which are not "regulation."

Under the authorities, however, the Attorney General's determination that the National Council is "subversive" is more than a mere finding and is "regulation;" it is, therefore, subject to the requirements of due process.

The cases hold that if an administrative finding or rul-

ing fixes a status or establishes legal relationships so as to lay a foundation for future regulation, then the finding or ruling is itself a "regulation" even though it does not itself command or restrain action. *LaCrosse Tel. Corp. v. Wisconsin Employment Relations Bd.*, 336 U. S. 18; *Columbia Broadcasting System v. United States*, 316 U. S. 407; *Waite v. Macy*, 246 U. S. 606; *Rochester Tel. Corp. v. United States*, 307 U. S. 125; *Powell v. United States*, 300 U. S. 276. Thus in the *LaCrosse Telephone* case, a state labor board's certification of an employee bargaining representative was held reviewable for validity even though the certification itself commanded no action; however, the employer's refusal to bargain with the certified representative could have subjected him to an administrative order for the unfair labor practice of refusing to bargain with a certified representative.

Where the administrative finding has such a status-determining effect, an administrative hearing is required by due process. *Shields v. Utah Idaho Central R. R. Co.*, 305 U. S. 177.

The determination here made by the Attorney General falls squarely within the status-determining principle, since it fixes the status of the National Council as a "subversive" organization for the purpose of supplying a foundation for action by agency loyalty boards, agency heads, and the Loyalty Review Board in discharging employees or refusing to employ applicants. This is, indeed, a conclusive fixing of status, since the loyalty boards and agency heads cannot, under the terms of the Executive Order, reject the Attorney General's determination as erroneous.

The situation presented is, like that in the *Columbia Broadcasting* and *Waite* cases, *supra*. In the *Columbia Broadcasting* case, the FCC adopted a rule for its own future guidance in granting or denying radio station licenses. The Court held that this rule was itself a review-

able order even prior to any licensing action based thereon, since it fixed the status of future license applicants. So here the Attorney General's determination fixes a rule for the guidance of agencies and boards in granting or denying a license for federal employment. This case is, indeed, stronger, for in *Columbia Broadcasting* the ruling could have been changed in the licensing proceeding by the agency passing on license eligibility, whereas here the Attorney General's ruling cannot be changed by those passing on employment eligibility. Furthermore, the FCC ruling was, unlike the Attorney General's ruling, in general terms and did not pass on any particular radio station by name.

In *Waite v. Macy, supra*, the Secretary of the Treasury adopted a rule laying down tests as to what constituted impure tea. A Tea Board regularly applied this rule in determining which tea was importable and which should be excluded. The Secretary's rule was held to be an order reviewable on complaint by a tea importer even without action by the Tea Board excluding his tea. So here the Attorney General's ruling that the National Council is "impure" for purposes of proceedings relating to exclusion of persons from federal employment is a reviewable order.

Accordingly, the Attorney General's determination is a regulation and a reviewable order which must conform to due process requirements, since it establishes standards, (defines status) for proceedings determining eligibility for federal employment.

The fact that this status is determined for proceedings determining eligibility of members or supporters of or contributors to the National Council rather than eligibility of the National Council itself does not affect the standing of the National Council to test the determination. This is

because the determination and the action pursuant thereto have an impact on (i. e., regulate) the relationship of employees or prospective employees with the National Council and thereby regulate the Council itself. Thus, as the complaint alleges, the finding has induced government employees to abandon or desist from membership in the Council and from giving it financial support. So in *Pierce v. Society of Sisters*, 268 U. S. 510, a school was held able to test the validity of a law which directly regulated only pupils, but which had the effect of inducing pupils not to attend the complaining school. In *Truax v. Raich*, 239 U. S. 33, an employee was able to test the validity of a regulatory statute which operated against employers, but whose effect was to induce the employer to discharge the employee. Again, in *Buchanan v. Warley*, 245 U. S. 60, a white person was able to test the validity of an ordinance prohibiting colored persons from buying his house. What is important, in other words, is not the *person* against whom the regulation is directly addressed, but the *relationship* regulated, and the various parties to that relationship have standing to test the regulation.

Even this complication is not present in the case of the individual petitioners. They, as potential government employees¹¹ and as members and officers of the National Council, are directly "regulated" by the finding which creates for them the status of *prima facie* ineligibility for government employment on grounds of "disloyalty."

It is true that petitioners are not presently applicants for federal employment. But for them to apply would be a futile and meaningless gesture so long as there is in

¹¹ Paragraph 41 of the complaint alleges that some of the individual petitioners have in the past had government employment, and that because of their expert professional knowledge the individual petitioners had a reasonable expectancy of similar employment in the future, which has been impaired, if not destroyed, by respondents' actions. R. 15, 16.

effect a rule which clearly would exclude them as leading spirits of the National Council. Their status is, therefore, as firm as that of the tea importer in *Waite v. Macy, supra*, who was able to challenge a rule which would have excluded his tea without waiting to have it actually excluded.

It is apparent that the distinction between "regulation" and "mere administrative finding" may in certain cases involve niceties. In our view, this, if ever, was a case where the leaning should be toward finding "regulation." In other cases, usually the person complaining of the finding has a later opportunity to contest it by challenging the future action based upon the finding. But no such opportunity is available to the National Council precisely because the immediate impact of the future application is on individuals. What is more, under the Executive Order even those individuals have no opportunity in the administrative exclusion proceeding to attack the validity or accuracy of the Attorney General's designation.

b. *The Attorney General's determination was made without due process of law*

We have seen, then, that the Attorney General's determination that the National Council is a "subversive" organization is a "regulation," and is, therefore, subject to the requirements of the due process clause. Clearly these requirements were not observed. In the words of the editorial in *The Washington Post, supra*, the determination of the Attorney General was made "without any fixed standards or process whatsoever. The Council of American-Soviet Friendship was placed on the Attorney General's list of subversive organizations without any advance notice, without a hearing, without the presentation of any supporting evidence and without any oppor-

tunity to appeal for judicial review. If this can be called 'due process' then the fifth amendment accords Americans no protection at all."

No justification has been offered, nor can any conceivably be offered, for this secret procedure adopted by the Attorney General. The request of the National Council to the Attorney General for the particulars upon which he based his judgment and for a public hearing received only the curt and unresponsive reply that "the Executive Order contains neither provision nor authorization for any of the procedural steps to which you have referred" (R. 12).

The Executive Order does, however, provide that the Attorney General may list an organization as subversive only "after appropriate investigation and determination." The complaint alleges that no such investigation was made (R. 11-12), and this allegation was admitted by the government's motion to dismiss. If this phrase in the Executive Order is to be given any meaning whatsoever, it is clear that the Attorney General misplaced his reliance on the Executive Order in denying notice and hearing. By such a denial he was violating the Executive Order.

Since the Attorney General's determination was a regulatory adjudication operating on a particular person, it had to observe procedural due process, including the giving of an administrative hearing prior to adjudication. *Shields v. Utah-Idaho Central R. R. Co.*, 305 U. S. 177; *Morgan v. United States*, 304 U. S. 1; *Lloyd Sabaud v. Elting*, 287 U. S. 329. Due process of law requires a full and fair hearing with prior notice of the nature of the issues involved, *Morgan v. United States*, *supra*; cf. *United States v. Cruikshank*, 92 U. S. 542, 558, 559; *United States v. Cohen Grocery Company*, 255 U. S. 81, 87, 89, and an opportunity to examine the evidence, to cross-examine witnesses, cf. *Motes v. United States*, 178 U. S. 458, 467, 471;

Kirby v. United States, 174 U. S. 47, 55, 61; *United States v. Lovett*, 328 U. S. 303, 317; and to present evidence on one's own behalf. *In re Oliver*, 333 U. S. 257. Nor may administrative agencies, any more than courts, adjudicate on the basis of evidence secretly collected and not revealed to the parties. *I. C. C. v. Louisville & N. Ry. Co.*, 227 U. S. 88, 93; *U. S. v. Abilene*, 265 U. S. 274, 286, 291.

This lack of procedural due process is further aggravated by the lack of standards employed by the Attorney General. The Executive Order empowers the Attorney General to list organizations which are "totalitarian, fascist, communist, or subversive." These words have no precise meaning, and the Attorney General has not indicated what he considers their content to be. Since there is no hearing and the basis for the determination is unrevealed, the Attorney General has unfettered discretion, and may list any organization which incurs his displeasure. In the present case, he has chosen, without particulars, without supporting evidence, and without a hearing, to brand an organization which engages only in the lawful propagation of ideas. If such practice is sanctioned, it can no longer be said that ours is "a government of laws not of men." Frankfurter, J., in *U. S. v. United Mine Workers of America*, 330 U. S. 258, 307.

5. VIOLATION OF RIGHT AGAINST BEING DEFAMED BY ULTRA-VIRES ACTION

a. *Petitioners Are Entitled to Relief if Respondents' Actions Are in Excess of Constitutional and Statutory Authority*

Not all harm caused by unconstitutional or unauthorized administrative action is redressable. The harm must also be "legal injury," that is, harm to legally protected interests.

When the validity of administrative action is challenged under the First and Fifth Amendments, there is no problem as to the source of the legally protected interests. These Amendments themselves create such interests in persons, the First creating certain protected interests in expression and assembly, and the Fifth creating certain protected interests in the procedures of regulation. Where, however, the challenge is that the administrative action is *ultra-vires* of the power of the Executive or of the powers of the federal government under the Tenth Amendment, the case is different. In Tenth Amendment cases, unlike First and Fifth Amendment cases, the protected interests must be found in a source other than the Tenth Amendment itself. The Tenth Amendment, in other words, is regarded not as creating individual rights but rather as imposing duties owed to the body politic. In Tenth Amendment cases, therefore, it is not enough to show harm caused by *ultra-vires* action; the harm must be to an interest protected by some other provision of the Constitution, by statute, or by common-law. *Tennessee Electric Power Co. v. TVA*, 306 U. S. 118; cf. *Perkins v. Lukens Steel Co.*, 310 U. S. 113. The test as to whether the interest invaded by a Tenth Amendment violation is protected by common-law is whether the invasion was one which would be subject to legal redress if committed by a private person (i. e., "tortious").

Thus in the *TVA* case, *supra*, the plaintiff suffered damage from competition by the TVA's engaging in activities challenged as exceeding federal power under the Tenth Amendment. The Court held that since "competition between natural persons is lawful" (at 138), plaintiff had asserted no right "protected against tortious invasion" (at 137), and hence had shown no harm to a legally protected interest. The case, then, would have been otherwise if the harm resulting from *ultra-vires* action had been caused not merely by competition, but by competitive practices of a kind

which are normally tortious (certain "unfair business practices"). In the *Perkins* case, *supra*, the harm suffered by plaintiff was exclusion from selling goods to the federal government unless it complied with conditions imposed by the Secretary of Labor allegedly in violation of statutory provisions. The Court held that plaintiff had not shown legal injury. Since, generally speaking, a prospective seller has no legal redress against a private person who refuses to buy the seller's goods except on his own conditions, the Secretary's determination could not be challenged even if it violated the statute. As stated by the Court (at 129), "The contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation." The statute involved, then, was, like the Tenth Amendment, regarded not as creating individual rights, but only a duty to the body politic. Hence, as in Tenth Amendment cases, violation of the statute was actionable only if the harm caused was tortious if committed by a private person (or was to interests created by the Constitution or some other statute). The case would have been different if the statute, like the First and Fifth Amendments, created individual rights, in which case all plaintiff would have to show would be a violation of the statute and harm resulting therefrom to the rights created. Thus if a statute requires an official to buy from a named individual, the latter can restrain the official from buying from others instead.

Under the *TVA* and *Perkins* cases, therefore, if appellees' actions are in excess of their constitutional authority, redress is available if those actions injure interests which by common-law, statute or Constitution are normally given protection. So, therefore, legal and equitable writs have run to redress or restrain harm to common-law rights by the unauthorized actions of government officials. *Land v. Dollar*, 330 U. S. 731; *Philadelphia Co. v. Stimson*, 223 U. S. 605; *American School of Magnetic Healing v. McAnnulty*,

187 U. S. 94. See also *Larson v. Domestic & Foreign Commerce Corp.*, *supra*. Obviously, this test is different than the theory pressed by respondents (and properly applicable only to due process rights) that rights exist only against administrative action which is "regulation."

We shall leave to a later sub-section the question of whether respondents' actions are in fact beyond their authority. At present, we consider only whether petitioners have acquired standing to make this contention by showing that respondents' actions, if *ultra-vires*, harm interests which are normally protected.

Clearly they do so in two respects. First, they harm interests in free speech, press and assembly, and these are constitutionally protected.

In addition, they harm the interest in reputation which is protected by the common law against invasion by private persons and thus, as we have seen, against invasion by *ultra-vires* administrative action.

The complaint alleges that respondents have published, and are continuing to publish, the "finding" that the National Council is an organization which is "totalitarian, fascist, communist or subversive" or which has adopted "a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." The application of such a description to an individual is clearly actionable defamation, since it impugns his reputation so "as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." 3 Restatement, Torts, sec. 559. A statement that a person is a Communist, a Communist representative, or a Communist sympathizer has been repeatedly held to be libelous. *E. g. Spanel v. Pegler*, 160 F. (2d) 619; *Wright v. Farm Journal, Inc.*, 158 F. (2d)

197; *Grant v. Readers' Digest Association*, 151 F. (2d) 733, cert. den., 326 U. S. 797; *Mencher v. Chesley*, 297 N. Y. 94, 75 N. E. (2d) 257.

Accordingly, the individual petitioners have been injured in their interest in reputation, protected by the common-law, since the characterization of the National Council obviously impugns those who, like the petitioners, are its leading spirits and agents in the public eye.

The National Council, of course, has been even more directly defamed. A non-profit membership corporation which "depends upon the financial support of the public" suffers actionable defamation from publication of any matter "which tends to prejudice it in public estimation and thereby to interfere with the conduct of its activities." 3 Restatement, Torts sec. 561(2). Accord: *N. Y. Society for Suppression of Vice v. MacFadden Publications*, 260 N. Y. 167, 183 N. E. 284, 86 A. L. R. 440. Obviously the Attorney General's designation is of such a nature. Cf. *Pullman Standard Car Mfg. Co. v. Union*, 152 F. (2d) 493, holding a corporation libeled by statements reflecting on its patriotism.

It follows from the foregoing that petitioners have legal redress for such defamation if respondents' actions were beyond their statutory or constitutional power.¹²

Here is most glaringly exposed respondents' error in seeking to extend to all rights the doctrine that publication alone does not violate rights under the due process clause. For it is only publication and not "regulation" that violates rights in reputation. This right, derived from common-law sources, is not affected by the due process clause require-

¹² Government officials are not, because of policy reasons, liable in money damages for defamatory statements made in connection with their official actions. *Spalding v. Vilas*, 161 U. S. 483. But the elimination of the remedy at law obviously does not eliminate, but fortifies, equitable relief. Cf. *Groner, C. J.*, concurring in *Glass v. Ickes*, 117 F. (2d) 273, 281; *United States v. Lovett*, 328 U. S. 303, 316.

ment of "regulation" any more than are other common-law rights against tortious actions or breaches of contracts.

b. Respondents' Actions Are in Excess of Constitutional and Statutory Authority

Our Constitution grants no power to any government official to list organizations as subversive or disloyal. Ours is a government of enumerated powers, and authority exercised by any branch of the federal government must find its source either in an express or implied power granted by the Constitution. *McCulloch v. Maryland*, 4 Wheat 316; *U. S. v. Butler*, 297 U. S. 1; *Marshall v. Gordon*, 243 U. S. 521. The President, as well as Congress, possesses no power not derived from the Constitution, *Ex parte Richard Quirin*, 317 U. S. 1, 25, 26.

In the *Joint Anti-Fascist* case, the court rested the right to designate organizations as subversive on the President's duty to execute federal laws (Constitution, Article II, Sec. 3). But there is no law which is here being executed. Section 9A of the Hatch Act, 5 U. S. C. sec. 118j, to which the court referred, makes ineligible for government employment members of any organization which "advocates the overthrow of our constitutional form of government in the United States." The Executive Order, however, calls for the listing of organizations other than those described by the Hatch Act.¹² And this listing has no substantial relevancy to the efficiency or loyalty of government employees. Indeed, as we have already shown, the listings under the Executive Order violate another section of the Hatch Act (5 U. S. C. sec. 118i).

¹² The difference between Hatch Act organizations and those described in the Executive Order is self-evident. It has also been expressly recognized by the Loyalty Review Board and the Attorney General (13 F. R. 9368-9369) and the Comptroller General (17 U. S. Law Week 2327, Jan. 25, 1949). The respondents have never asserted that the National Council "advocates the overthrow of our constitutional form of government."

Furthermore, this Court has declared that no government official has power to prescribe orthodoxy of beliefs. *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642; *Hannegan v. Esquire*, 327 U. S. 146, 158; *Thomas v. Collins*, 323 U. S. 516, 545. The Attorney General has applied the Executive Order so as to make himself a judge of political orthodoxy and loyalty and so as to inform the public that certain ideas are officially discouraged and prohibited. He has thus violated the most revered traditions of our Constitution. See Commager, *Who Is Loyal to America*, Harper's Magazine, Sept. 1947; De Tocqueville, II *Democracy in America*, 117 (Bradley ed. 1945); O'Brian, *Loyalty Tests and Guilt by Association*, 61 Harv. L. Rev. 592, 605; Emerson and Helfeld, *Loyalty Among Government Employees*, 58 Yale L. J. 1, 116.

Conclusion

The basic issue in this case has been aptly put in the conclusion of the editorial from The Washington Post, cited *supra*:

If the Attorney General can put the Council of American-Soviet Friendship outside the pale of decency by an arbitrary designation of it as disloyal, he can do the same in respect of any religious, political, or social organization advocating unorthodox or unconventional beliefs. This is a power incompatible with a government of laws. It is a power irreconcilable with freedom.

The writ of certiorari should be granted, and the judgment below should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

NATIONAL COUNCIL OF AMERICAN-SOVIET
FRIENDSHIP, INC., ET AL., PETITIONERS

u.

HOWARD MCCRATH, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL.

P
N PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE DIS-
TRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 554

NATIONAL COUNCIL OF AMERICAN-SOVIET
FRIENDSHIP, INC., ET AL., PETITIONERS

v.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE DIS-
TRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Columbia (R. 17-19) is not reported. The *per curiam* order of the Court of Appeals for the District of Columbia Circuit, affirming on the authority of *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. 2d 79 (C. A. D. C.), was entered without opinion (R. 20).

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1949 (R. 20). The petition for a writ of certiorari was filed on January 23, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether petitioners have any legal standing or right to challenge a designation, made by the Attorney General pursuant to instructions issued by the President under Executive Order 9835, that petitioner National Council of American-Soviet Friendship, Inc., is a communist organization.

STATUTE AND EXECUTIVE ORDER INVOLVED

Section 9A of the Hatch Act, 53 Stat. 1148, 5 U. S. C., Supp. II, 118j, and Executive Order 9835, 12 F. R. 1935, are set forth in the Appendix to the Brief in Opposition in *Joint Anti-Fascist Refugee Committee v. McGrath*, No. 556, this Term.

STATEMENT

This case was brought to challenge the designation by the Attorney General, for the purpose of the Federal government's loyalty program, of petitioner National Council of American-Soviet Friendship, Inc. as a communist organization. The designation of organizations and the publication thereof pursuant to statute and executive order are fully described at pp. 2-4, 17-47, of the Brief in Opposition in the *Joint Anti-Fascist* case, No. 556, this Term.

Petitioners herein, the National Council of American-Soviet Friendship, Inc., the Denver Council of American-Soviet Friendship, and six officers thereof (R. 4-5), allege that they have suffered irreparable injuries as a result of the above described designation and that the actions of respondents "have violated the rights of the plaintiffs guaranteed by the First and Fifth Amendments to the Constitution and are contrary to the Ninth and Tenth Amendments" (R. 13, 16).¹ Specifically, the injuries alleged are these: The National Council and Denver Council, whose avowed purpose is to disseminate educational material concerning the Union of Soviet Socialist Republics in order to strengthen friendly relations between the United States and the Soviet Union (R. 4, 9), have lost members, officers, sponsors, contributions, attendance at meetings, circulation of their publications, acceptance of their exhibits and other materials by educational institutions, have been denied meeting places and radio time, and have been unable to gain the support of federal employees (R. 13-14). It is further claimed that the National Council has been deprived of its status as a tax exempt organization by the Treasury Department (R. 14) and that the personal and professional reputations of

¹ It is also alleged that the designation of the Attorney General was made without the "appropriate investigation and determination" required by Part III, Section 3 of the Executive Order (R. 11-12), and that the National Council does not fall within the subversive categories of the Executive Order (R. 10).

the individual petitioners have been damaged and their opportunities for public and private employment impaired (R. 13-15).

The action was brought on June 29, 1948, to enjoin respondents, the Attorney General and the Chairman and members of the Loyalty Review Board of the Civil Service Commission, from designating and publicizing the name of the National Council, or its affiliates, as a communist organization, to direct respondents to remove the National Council's name from the list of designated communist organizations, to make a public statement of this removal, and to take no action based on the inclusion of the National Council's name in the list of designated communist organizations. Petitioners further prayed for a declaratory judgment that Part III, Section 3, and Part V, Section 2, of Executive Order 9835 are unconstitutional. (R. 16.)

Respondents moved to dismiss the complaint for want of a justiciable controversy between the parties and for failure to state a claim upon which relief can be granted (R. 17). Following a hearing, the District Court, on February 1, 1949, dismissed the complaint (R. 19). The Court of Appeals affirmed *per curiam* (R. 20).

ARGUMENT

The instant case, decided on the authority of *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. 2d 79 (C.A.D.C.), presents the same issues raised by the petition for writ of certiorari in that case and advances the same major arguments. No.

556, this Term, *sub nom. Joint Anti-Fascist Refugee Committee v. McGrath*. For the reasons stated in our Brief in Opposition in No. 556, we submit that the courts below correctly dismissed the complaint herein on the grounds that no justiciable controversy exists and that petitioners have not stated a cause of action upon which relief can be granted. Our basic position is that the actions complained of do not effect any change in petitioners' legal status; that respondents are absolutely privileged to publish matter, even of a defamatory nature, in the exercise of official duties; and that such publication invades no justiciable legal rights.

Certain narrow contentions in addition to those advanced in No. 556 are made herein. The petition urges that the individual petitioners have standing to sue as persons with a vaguely defined "reasonable expectancy" of future Government employment (R. 15) made *prima facie* ineligible for such employment by reason of their relationship with the National Council (Pet. 25). We think it clear that they do not have such standing. *United Public Workers v. Mitchell*, 330 U. S. 75, 86-91; and see Brief in Opposition in No. 556, pp. 12-14, fn. 7-8.

Petitioners herein also contend that there is a justiciable controversy because the complaint factually alleges that respondents have abridged the rights of petitioners guaranteed by the First Amendment and that this allegation is admitted by the motion to dismiss (Pet. 16). But this allegation, which also appears in the complaint in the

Joint Anti-Fascist case, is a conclusion of law, not a statement of fact, and is certainly not admitted by the motion to dismiss. Similarly, petitioners herein assert that the complaint alleges a failure to make an "appropriate investigation and determination" and that this allegation of fact is also admitted by the motion to dismiss (Pet. 27). Again, this is a conclusion of law and not a statement of fact. In alleging there was no "appropriate investigation" petitioners are only summarizing their contention that an "appropriate investigation" requires notice and a hearing.

CONCLUSION

The decision below is correct, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1950

Supreme Court of the United States

October Term 1949

No. 554

NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP ET AL.
Petitioners,

v.

J. HOWARD McGRATH ET AL.

Suggestion in Connection With Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

On January 23, 1950, the petitioners filed in this Court a petition for a writ of certiorari in the above-captioned case. Subsequently on March 13, 1950, while this petition was pending, the government having duly filed its opposition thereto, the Court granted the petition for writ of certiorari in No. 556, *Joint Anti-Fascist Refugee Committee v. McGrath et al.*

Since that date no action has been taken on the petition filed herein by the petitioners. It is believed that the failure of the Court to act on the petition in the instant case arises from its assumption that the issues in No. 556 and in the present case are identical so that a hearing on No. 556 will suffice to resolve the issues presented.

The petitioners, however, respectfully suggest that the ends of justice and the efficient disposition of the work of this Court require that the petition in the instant case be granted notwithstanding the granting of the petition in No. 556. This suggestion is based upon the following reasons.

In granting the petition in the *Joint Anti-Fascist* case, the Court, of necessity, concluded that the question of the legality of the action of the Attorney General in listing organizations on the so-called subversive list pursuant to Executive Order No. 9835 is an important issue requiring consideration and decision by this Court. It would accordingly be appropriate for the Court to have before it at the time of consideration of this issue different facets of the problem.

The petition filed in the instant case, although involving the same general issue as that presented in the *Joint Anti-Fascist* case, presents important variations of the problem.

These variations are as follows:

(1) The sole complainant in the *Joint Anti-Fascist* case is the Joint Anti-Fascist Refugee Committee. None of the members of the Committee are joined as plaintiffs. In the instant case, the complaint joins as plaintiffs not only the National Council of American-Soviet Friendship, Inc. and the Denver Council of American-Soviet Friendship, but also the individual officers and leaders in these organizations. The complaint alleged that these individuals had been injured by the actions of the respondents in the exercise of their rights under the First Amendment, in the performance of their occupations as lecturers, as ministers and as an architect, and in their opportunities for public and private employment. The Court of Appeals for the District of Columbia considered the absence of members of the *Joint Anti-Fascist Committee* as complainants in that case as a significant obstacle to the granting of relief. The court there said, at 177 F. (2d) 79, 83:

If the Committee means to assert claims in behalf of its members reputedly disgraced by reason of the designation, it is enough to point out that only the members themselves are entitled to complain of any personal injuries they may suffer. Likewise, only the members, not the Committee, can seek redress for alleged impairment of members' constitutional rights of freedom of speech and assembly. Those rights are personal to the individual members. . . . The Committee's declared purposes are altogether charitable, which would give it no authority to assert or protect constitutional liberties and privileges of its individual members.

(2). The complaint in the instant case, unlike that in the *Joint Anti-Fascist* case, alleges that the National Council never engaged in any conduct or activity which provided any basis for it to be designated by the Attorney-General under Executive Order No. 9835 (E.O. 10). The absence of such an allegation in the *Joint Anti-Fascist* complaint was considered significant by both the Court of Appeals (177 F (2d) at p. 81), and by the government in its opposition (p. 44) to the *Joint Anti-Fascist* petition for certiorari.

(3) The National Council, unlike the *Joint Anti-Fascist* Committee, expressly requested of the Attorney General and was expressly denied a bill of particulars and a hearing.

(4) The National Council is an organization devoted exclusively to the dissemination of information and ideas by press, speech and public meetings. Thus, it is engaged directly and exclusively in the exercise of rights guaranteed by the First Amendment, and the complaint, the allegations of which must be taken as true, alleged a direct and immediate interference with these rights by the respondents' actions. The finding by the Court of Appeals that the *Joint Anti-Fascist* Committee is a charitable organization not directly engaged in the exercise of free

speech and press was considered significant by that court (177 F (2d) at 83).

It may be true that no one of these considerations is necessarily controlling in the determination of the basic issue presented. Indeed, as stated in our petition, we considered the decision of the Court of Appeals in the *Joint Anti-Fascist* case to be erroneous and to require reversal by this Court. But these considerations were considered significant by the lower court, and have been urged by the government as obstacles to recovery by the Joint Anti-Fascist Committee. Any one of them may be regarded as significant by this Court or by one or two members of the Court. In the event of a divided Court, these considerations might well make the difference between reversal and affirmance of the court below. Since none of these considerations are present in the *Joint Anti-Fascist* case, counsel for the Joint Anti-Fascist Committee will not be in a position adequately to develop them before the Court. And an issue of this significance requires that it be fully explored by differing approaches if only to illuminate the nature of the question involved.

Because of the factual variances between the two cases, it is appropriate that the Court hear argument in both cases, particularly since the instant case more clearly reflects the impact of the respondents' actions on the exercise of rights guaranteed by the First Amendment. Since a decision in the *Joint Anti-Fascist* case will not, because of these differences, necessarily dispose of the petitioners' case, the efficient operation of the Court would justify hearing both cases at the same time so that the two cases may be examined together and not at separate intervals.

Moreover, it will be noted from a comparison between the petition for certiorari in the instant case and that in the *Joint Anti-Fascist* case, that the approach taken in the two cases are markedly different. The *Joint Anti-*

Fascist petition attacks the entire Loyalty Order and Section 9A of the Hatch Act. In contrast, petitioners in the instant case, attack only the actions of the respondents directed against the petitioners, and those portions of the Loyalty Order upon which their actions were based. Furthermore, the petition in the instant case, unlike the *Joint Anti-Fascist* petition, contends that the Attorney General, in listing the National Council as "subversive", failed even to comply with the provisions of Executive Order 9835, and the record in the instant case more adequately permits that challenge to be made.

And even to the extent that the issues raised by the two petitions for certiorari are identical, the legal approaches and analyses are markedly different. This is particularly true with respect to the key issue of whether the parties have standing to sue. Where different approaches and analyses are presented on an issue of this nature, this Court should have the benefit of them.

Finally, elemental justice requires that the petitioners in the instant case should be given the opportunity to have their own counsel present their arguments on their own behalf, and not be relegated to a mere waiting role.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

No. [REDACTED] 7

NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, INC.,
DENVER COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, WIL-
LIAM HOWARD MELISH, RICHARD MORFORD, HENRY PRATT
FAIRCHILD, JOHN A. KINGSBURY, M. WALTER PESMAN,
CORLISS LAMONT,

Petitioners,

v.

J. HOWARD McGRATH, Attorney General of the United
States; SETH W. RICHARDSON, Chairman of the Loyalty
Review Board of the United States Civil Service Com-
mission; GEORGE W. ALGER, JOHN HARLAN AMER, et al.,
etc.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit.

BRIEF FOR PETITIONERS

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Supreme Court of the United States

OCTOBER TERM, 1949

No. 554



NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, INC.,
DENVER COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, WIL-
LIAM HOWARD MELISH, RICHARD MORFORD, HENRY PRATT
FAIRCHILD, JOHN A. KINGSBURY, M. WALTER PESMAN,
CORLISS LAMONT,

Petitioners,

v.

J. HOWARD MCGRATH, Attorney General of the United
States; SETH W. RICHARDSON, Chairman of the Loyalty
Review Board of the United States Civil Service Com-
mission; GEORGE W. ALGER, JOHN HARLAN AMEN, et al.,
etc.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The Court of Appeals did not file an opinion, but its order (R. 20) expressly affirmed on the authority of its previous decision of *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. (2d) 79, cert. granted, No. 556, Oct. Term, 1949. References to the rationale of the decision below will,

therefore, be to the opinion in the *Joint Anti-Fascist* case which will henceforth be so cited. The opinion of the District Court has not been reported. It appears at R. 17-19

JURISDICTION

The jurisdiction of the Court rests on 28 U. S. Code, Section 1254. The petition for a writ of certiorari was granted on May 15, 1950 (R. 23).

EXECUTIVE ORDER INVOLVED

Executive Order 9835, 12 F. R. 1935, is quoted in the Appendix hereto.

STATEMENT OF THE CASE

On June 29, 1948, the petitioners filed a complaint in the District Court for the District of Columbia seeking an injunction and declaratory judgment against the Attorney General¹ and the chairman and members of the Loyalty Review Board of the United States Civil Service Commission (hereinafter called the Board) (R. 2, 6).

No answer to the complaint was filed. Respondents filed a motion to dismiss the complaint (R. 17), which was granted (R. 19). Accordingly, the allegations of the complaint must be taken as true for present purposes.

The allegations of the complaint (R. 2-16) are summarized as follows.

Executive Order 9835 establishes an employees loyalty program in the executive branch of the federal government. Section III(3) of the Order requires the Attorney General to supply to the Board the names of organizations designated by him, after appropriate investigation and determination, as "totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny

¹ The complaint originally named Tom C. Clark, Attorney General, as a defendant. Respondent McGrath was substituted by order of the Court of Appeals (R. 21).

others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means."

The Board is required to communicate the Attorney General's listing to the various federal departments and agencies for use in proceedings to determine whether applicants for federal employment shall be denied employment and whether federal employees shall be dismissed on the basis that "reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States" (Ex. Order, III (3) (a), V (1)). Thus in determining this issue, the adjudicating bodies consider the employee's or applicant's "membership in, affiliation with or sympathetic association with" any organization on the Attorney General's "subversive list" (id., V(2) (f)).

In November 1947 and May 1948, the Attorney General furnished the Board a list of organizations so designated by him, and included therein the name of petitioner National Council of American-Soviet Friendship, Inc. (hereinafter called the National Council) (R. 11). The National Council had never received any advance notice that it would be so listed, and the Attorney General had not made an "appropriate investigation and determination," as required by the Executive Order, prior to listing the National Council (R. 11, 12). The National Council requested the Attorney General for the particulars on which he had based his conclusion and for a hearing at which it could refute his charges. The Attorney General refused on the grounds that such procedures were not authorized by the Executive Order (R. 12).

In December 1947 and May 1948, the Board released for publication the listing of the Attorney General, which included the name of the National Council. This listing received wide and repeated publicity throughout the country (R. 12).

The National Council is a non-profit membership corporation, whose purpose is "to strengthen friendly relations

between the United States and the Union of Soviet Socialist Republics by disseminating to the American people educational material regarding the Soviet Union, by developing cultural relations between the peoples of the two nations, and by combating anti-Soviet propaganda designed to disrupt friendly relations between the peoples of these nations and to divide the United Nations" (R. 4). It engages in numerous activities to further these purposes, including exhibition, circulation and publication of materials and literature dealing with life in the Soviet Union, maintaining a speakers' bureau, holding of public meetings, etc., many of which involve cooperation with museums, libraries, schools and other organizations (R. 6-9). It has expended large sums up to approximately \$100,000 per annum, to finance its activities, including the maintenance of a staff and office, preparation of literature and other materials, etc. (R. 9). Its revenues have been generally derived by contributions from organizations and individuals in sympathy with its objectives and largely through collections at meetings (*ibid*).

The National Council has never engaged in any conduct or activity which provides any basis for it to be designated as "totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts by force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means" (R. 10).

The Denver Council of American-Soviet Friendship, also a petitioner, is one of the affiliates of the National Council (R. 4). The individual petitioners are officers or directors of the National Council or the Denver Council (R. 4, 5).

As a result of the actions of respondents in listing and publicizing the National Council as a "subversive" organization² and in using the listing in the loyalty program, the

² We use the word "subversive" henceforth as including any or all of the categories referred to in section III(3) of Executive Order 9835—i.e., "totalitarian, fascist, communist, subversive," etc.

National Council's activities have been seriously hampered and it has suffered great pecuniary loss. Thus the National Council and its affiliates, including the Denever Council, have lost numerous members and officers, lost public support and contributions, lost attendance at meetings, lost circulation of their publications, lost acceptance by schools and organizations of their material, have been denied meeting places and radio time, and are unable to get members and support from federal employees. In addition, the listing caused the Treasury to rule publicly that contributions to the National Council and its affiliates will no longer be recognized as tax-exempt contributions to educational institutions, with the result that the National Council and its affiliates have lost large sums of money which they would otherwise have received as contributions (R. 13, 14).

Serious damage has also been caused to the individual petitioners by respondents' action. Rev. Melish's position as Assistant Rector of the Church of the Holy Trinity has been jeopardized. Morford has been hampered in the right to perform his duties and employment (from which he receives his livelihood) as chief executive of the National Council. Fairchild, Kingsbury and Lamont are lecturers, and have lost bookings and had their professional standing impaired. Pesman has lost commissions, as an architect for public bodies has had contracts cancelled, and has lost his teaching position at a university (R. 15). In addition, the individual petitioners and all members and supporters of the National Council have been hampered in their right to associate in the activities of the Council and have had their opportunities for public and private employment impaired (R. 15, 16). The reputations of petitioners have been damaged and they have been subjected to vilification and harassment (R. 12, 13).

The complaint alleged that the actions of the respondents were unconstitutional and in excess of any statutory authority (R. 13), and that Part III, section 3 and Part V, section 2

of Executive Order 9835 are unconstitutional as construed and applied by the Attorney General (*ibid*). The relief sought included a declaratory judgment to this effect and an injunction restraining the respondents from keeping in effect the listing of the National Council or taking any action on the basis thereof (R. 16).

The judgment of the District Court dismissing the complaint was affirmed by the Court of Appeals for the District of Columbia on October 25, 1949. It rendered no opinion in the case, but its order (R. 20) relied on its opinion in *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. (2d) 79. That opinion, however, was not addressed to the arguments, which are relied upon herein and which were contained in petitioners' brief filed in the Court of Appeals urging reversal of the decision of the District Court.

The *Joint Anti-Fascist* case held that a complaint for injunction seeking relief from the Attorney General's designation of an organization as "subversive" did not present a "justiciable controversy" and hence was properly dismissed. The court further briefly stated its views that the Attorney General's act was valid. 177 F. (2d) at 84.

SPECIFICATION OF ERRORS

The court below erred in affirming the judgment of the trial court because

(a) a justiciable controversy was presented by the complaint, the petitioners had standing to sue, and the complaint stated a claim upon which relief can be granted; and

(b) the actions complained of abridged petitioners' freedoms of speech and assembly in violation of the First Amendment, deprived them of liberty and property without due process of law in violation of the Fifth Amendment, and were in excess of the executive power conferred by the Constitution and in violation of the Ninth and Tenth Amendments.

ARGUMENT

I. The Complaint Presents a Justiciable Controversy, and Petitioners Have Standing to Sue.

This case challenges governmental action which has impaired the effective exercise by petitioners of their rights of speech and assembly. The court below has held that the complaint did not present a "justiciable controversy" because the impairment of these rights was accomplished not by an outright interdiction, but by the use of more insidious governmental pressures, applied to deprive petitioners of an audience of supporters, and even of a meeting place. The court below has thus held that First Amendment freedoms may not receive judicial protection so long as they are abridged by sophisticated methods.

The method which was here employed is that of the index expurgatorius and the blacklist. It consists of an authoritative determination, made in camera, that certain persons, organizations, literature, or doctrine are heretical, disloyal, "subversive," or otherwise officially obnoxious. Once the official stigmatization is published, any person who disregards its implication to boycott those listed incurs such penalties as excommunication from governmental employment and the social, economic and political sanctions which derive from public odium. These sanctions are, of course, particularly effective in a time of political tension and public hysteria.

This kind of censorship is currently in its heyday as a technic for suppressing political dissent in this country. Having been developed and applied to an extreme by the House Committee on Un-American Activities,³ it has been adopted by the executive branch in Executive Order 9835.

³ On the Committee's exercise of censorship by "exposing" to public retribution those who advocate what it determines to be "un-American" or "subversive" ideas, see Note, *Constitutional Limitations on the Un-American Activities Committee*, 47 Col. L. Rev. 416; Ogden, *The Dies Committee* (2d ed. 1945); Cushman, *Civil Liberty and Public Opinion, in Safeguarding Civil Liberty Today*; Edward L. Bernays *Lectures of 1944 given at Cornell University* (1945) 100, 101; Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 Harv. L. Rev. 1193.

Legal and political considerations obviously demanded that the establishment of this executive index be given an ostensible connection with a governmental function. Popular revulsion and judicial intervention would have been invited if the executive had issued a bare order which simply declared that the National Council was officially determined to be "subversive," and that all persons were required to refrain from belonging to or supporting it under the penalty of being barred from governmental employment, deprived of tax benefits, and publicly branded as disloyal.

This is exactly what the Executive Order provides, but it does so as part of a purported program to protect "the democratic processes which are the heart and sinew of the United States" by insuring that federal employees "be of complete and unswerving loyalty to the United States" and that "maximum protection . . . be afforded the United States against infiltration of disloyal persons into the ranks of its employees" (preamble, Ex. Order 9835). As will later appear, however (*infra*, pp. 31, 32), the listing of "subversive" organizations has only a fictitious connection with the purported objective of guaranteeing the fidelity of government servants; the only real effect of the listing is to infringe the civil liberties of great numbers of the American population, including the petitioners. Indeed, the deliberate avoidance of any procedure which would permit an accurate determination of which organizations are "subversive" is itself plain proof that the executive is interested not in listing "subversive" organizations, but only in listing those whom, for reasons known to himself, he dislikes and seeks to destroy.

The greatest justification for judicial review of the constitutional validity of legislative and executive action is that it preserves and gives vitality to the Bill of Rights. We have been told: "No higher duty, no more solemn responsibility rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human

being subject to our Constitution—of whatever race, creed or persuasion.” *Chambers v. Florida*, 309 U. S. 227, 241. But the Bill of Rights is not translated into living law by courts which refuse to take cognizance of infringements simply because these, though effective enough, are accomplished by subtle methods, employed in the name of security and democracy.

The fundamental constitution error of the court below is, then, that it has failed to discharge its primary obligation to give vitality to the Bill of Rights. It has refused to recognize that the freedoms of speech and protection must be judicially protected against abridgement by technologically advanced mechanisms. It has willingly allowed itself to be hoodwinked into accepting as a measure of internal security an action of the executive which erodes the liberties on which true security must rest.

A sustaining of the decision below, therefore, would imply that the courts have virtually withdrawn from the function of protecting civil liberties. For it is plain that in these times our liberties are endangered chiefly by measures which utilize technics or indirection and wrap themselves in a cloak of a purported governmental function—currently “internal security” is the fashionable garb. (Cf. *United States ex rel. Krafft v. Shaughnessy*, 338 U. S. 537). It was not to be expected that the Bill of Rights would eliminate governmental attempts at censorship. The weed is too sturdy to uproot, and its proliferation continues under ingenious concealments. This Court has stated:

The high place in which the right to speak, think, and assemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end indicates the solicitude with which we must view any assertion of personal freedoms. We must recognize, moreover, that regulation of ‘conduct’ has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas. We have been reminded that ‘It is not often in this country that we now meet with

direct and candid efforts to stop speaking or publication as such. Moderate inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within officials control'. (*American Communications Association v. Douds*, 339 U. S. 382, 399, citing Jackson J., concurring in *Thomas v. Collins*, 323 U. S. 516, 547).

This case presents as blatant an instance as ever there was in which governmental authority seeks to censor unpopular ideas by indirect and uncandid efforts and in which it has spuriously associated speech with a factor which may be officially regulated. If courts deny jurisdiction of the controversy precisely because of the spurious association and the indirect and uncandid method, they exhibit little solicitude for assertions of personal freedoms.

The decision below, indeed, manifests not a sensitive but a callous attitude toward the right of political dissent. It is impossible to believe that the court would have exhibited a similar disinclination for intervention if the case before it had been one in which the Attorney General had listed the Catholic Church as a "subversive" organization for the purposes of the loyalty order. Nor can we believe that the court would have insisted that a listing of the Catholic Church was only a matter of internal executive housekeeping with which it could have no concern. Yet if to the lack of standards and procedures of the loyalty order is added judicial unreviewability, it is plain that the executive can readily declare religious organizations to be subversive. If political considerations today prevent him from so proscribing the Catholic Church, they may not be so effective tomorrow, and perhaps even today he could, with political safety, so list Jehovah's Witnesses or some other minor sect. The court below has failed to realize that freedom of religion, freedom of speech, and freedom of assembly are given like protection by the same Amendment (*cf. Prince v. Massachusetts*, 321 U.S. 158, 164). It has overlooked the fact that its doctrine permits executive black-

listing of organizations whose names do not contain such words as "Anti-Fascist" or "American-Soviet Friendship."

The decision below was expounded in an opinion which mixes bad logic with misread precedents. The court held that no "justiciable controversy" existed because the Executive Order and the Attorney General's listing "imposes no obligation or restraint" on the National Council, "commands nothing" of it, denies it "no authority, privilege, immunity or license," and subjects it "to no liability." Furthermore, it held, the Attorney General's list was "furnished the Board only by way of information and advice," and "cannot be put in the category of laws or regulations;" the "correctness of administrative advice cannot be reviewed by the courts," and "at most, any injury to the Committee is indirect—purely incidental to the objects and purposes of the loyalty program." (*Joint Anti-Fascist* case at 82, 83). The actions complained of, the court states, "were not aimed at the [National Council], but were necessary steps in executing the law and carrying out the loyalty program. It is not unusual for official action, intended for one purpose, to affect adversely others against whom it is not directed. But these unavoidable consequences cannot stay the hand of government. They afford no ground for judicial review." (*Id.* at 83).

The theory of the opinion is, then, that the reviewability of administrative action depends on the form of the action and not on its impact on the complainant or its plain consequences. To be reviewable, the action must in form be addressed to the complainant and must regulate him by a legalistic mechanism. If it regulates him other than by commanding action, denying a privilege, or subjecting him to liability, then it does not, so far as the courts are concerned, regulate him at all. The courts will not take into account regulation by social and economic pressures even though these are invoked and insured by the administrative action.

The court below has formulated this thesis as a rule of general jurisprudence. It did not examine the particular interests for which the complainant sought judicial protection, nor does it intimate that certain interests may be protected against infringement by action which is not "regulation" by the court's definition. On the contrary, it assumes that no interest is judicially protected against action which is not such "regulation," and it cites as precedents cases which involved interests of a different kind than those asserted in the case before it.

This approach is on its face sterile. When a person seeks relief from a court, he is asking judicial protection for a particular interest. The nature of the interest will vary from case to case. The source of the legal protection claimed for it, as whether one clause of the Constitution or another, will vary. And just as the interests and the source of protection vary, so, it is plain, will the nature and extent of the protection vary. Because certain interests are not protected against harm caused by the publication of administrative findings, it does not follow that no interest is protected against such harm. It is absurd to generalize to that effect for all interests on the basis of decisions which involved only certain interests. The only sound approach is to examine the particular interest asserted and the source and purpose of its legal protection before deciding whether or not that interest must be judicially protected against harm flowing from the publication of administrative findings.

The precedents chiefly relied on by the court below denied complainants relief from harm caused by allegedly erroneous administrative findings on the ground that such findings, even if erroneous, caused no legal injury since they were not "regulation." *Standard Computing Scale Co. v. Farrell*, 249 U.S. 571; *United States v. Los Angeles & S.L.R. Co.*, 273 U.S. 299; *Employers Group v. National War Labor Board*, 143 F. (2d) 145, cert. den. 323 U.S. 735; *National War Labor Board v. U.S. Gypsum Co.*, 145 F. (2d) 97, cert.

den. 324 U.S. 856. In these cases the complaints sought the protection of the due process clause of the Fifth or Fourteenth Amendments. The courts held that the due process clause protects only against governmental action which is at least "regulation", and that mere publication of administrative findings is not "regulation" and thus does not cause legal injury which that clause will redress. The decisions establish, and it may be granted, that the words "shall be deprived" in the due process clause extends only to action which is at least "regulation" (i.e., which commands or restrains action or creates liability) and not merely publication of findings. These cases did not and could not decide that there do not exist rights derived from sources other than the due process clause against harm caused by such publication.⁴

Where the Fourteenth Amendment is not involved, there can be rights against harm by administrative publication which is not "regulation". Thus in *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U.S. 56, the Court held that equitable relief was available if an administrative agency threatened to commit harm to common-law interests merely by publishing, in excess of statutory authority, confidential business information. The Court of Appeals of the District of Columbia has itself held to like effect in a case in which the distraction of spurious pleas of "security" was absent. *Bank of America National Trust & Savings Ass'n v. Douglas*, 105 F. (2d) 100; cf. *American Sumatra Tobacco Corp. v. SEC*, 93 F. (2d) 236. In these cases "regulation" was not a prerequisite to the availability of relief because there was involved not a deprivation of

⁴ In the *Standard Scale Co.* case, *supra*, the harm complained was loss of sales resulting from publication of an administrative report which, in setting out specifications for accurate scales, excluded the kind of scales manufactured by the plaintiff. In the *Los Angeles & S.L.E. Co.* case, *supra*, the harm complained of was the impairment of business credit by the publication of a report allegedly undervaluing the complainant's assets. Both cases involved only claims for protection under the Fourteenth Amendment. The *War Labor Board* cases, *supra*, held only that an unenforceable "directive" which creates no legal liabilities is not "deprivation" of property for due process purposes merely because it might induce the President to seize the property (an action which would be such "deprivation").

property contrary to due process but rather ultra-vires action damaging a recognized common-law interest.

In the present case, petitioners assert respondents' actions contravene the First, Fifth, Ninth and Tenth Amendments. Whether a "justiciable controversy" is presented depends on whether these Amendments afford legal protection to petitioners' interests against the harm caused thereto by the kind of administrative action here involved. To determine this question it is necessary to examine these Amendments separately, so as to ascertain how far their protection extends and what is the prerequisite for their invocation.

A. "Justiciability" and the First Amendment.

Petitioners invoke the First Amendment to protect their interests of speech, press and assembly against the respondents' actions. These interests are protected by the First Amendment not merely against "deprivation" without due process of law, but against any governmental action which restrains or interferes with ("abridges") them, whether the interference be "direct" or "indirect" and whether it be accomplished by "regulation" or by other pressure.

It is true, of course, that this Court has created exceptions to the stark, unequivocal terms of the First Amendment. As a result, the government may, under certain circumstances, abridge free speech and free assembly. From the Court's latest decision in this field, *American Communication Association v. Douds*, 339 U. S. 382, it appears that governmental abridgement of speech is permissible in two categories of cases. In the first, a direct restraint or prohibition of speech is permissible if, and only if, the "clear and present danger" test is satisfied. In the second, governmental regulation of conduct, as distinguished from measures aimed at the suppression of dangerous ideas, may indirectly "discourage" the exercise of free speech if, and only if, the social interest in the prevention of the anti-social conduct out-balances the social interest against the discouragement of the speech.

As to the validity of this view of the First Amendment, we have reservations of our own. But for present purposes, the point to be made is that neither limitation on the scope of the First Amendment goes to jurisdiction to hear and determine the controversy. The exceptions to the scope of the First Amendment establish only standards of decision, not areas of "non-justiciability."

Thus the existence of a clear and present danger of a serious, substantive evil has been used to sustain the validity of a direct restraint on speech. But it has not resulted in making the controversy "non-justiciable." Similarly, if the interference with speech is a "discouragement" indirectly stemming from the regulation of conduct, the courts, under *Doubs*, must determine the validity of the regulation by balancing the competing interests. They cannot decline jurisdiction to consider validity on the grounds that the administrative action merely indirectly discourages free speech, for then they are refusing to accept their responsibility to balance the competing interests.

What *Doubs* teaches, then, is that any governmental inhibition of speech is subject to judicial review. Whether the inhibition is a direct restraint or an indirect "discouragement" goes not to the availability of review, but to the standards to be applied in determining validity.

The decision below is thus flatly at odds with the *Doubs* case. The decision below rests on the basis that the courts may not review administrative action which only indirectly or consequentially abridges speech. But in *Doubs* the Court stated:

When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented. (at p. 399)

And the Court further stated:

The statute does not prevent or punish by criminal sanctions the making of a speech, the affiliation with any organization, or the holding of any belief. But as we have noted, the fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. (at p. 402)

Under these passages it is plain that a court cannot refuse jurisdiction to review governmental action because it only indirectly or conditionally abridges or discourages speech. Once there is shown to be any interference with speech, a "justiciable controversy" exists, requiring the court to balance conflicting interests and to determine the coercive effect of an indirect discouragement.

Under the *Douglas* decision, then, a "justiciable controversy" is here presented because the governmental actions complained of have had a restraining effect on petitioners' exercise of their rights of speech and assembly. Whether this restraint is valid because it falls within limitations placed on the scope of the First Amendment goes to the constitutional merits, not to jurisdiction, and the question is properly deferred to that portion of our brief which deals with the merits. It is enough for the present that it be recognized that governmental action presents reviewable issues, a "justiciable controversy," simply if in fact it interferes with the exercise of speech and assembly. The jurisdiction depends not on the form of the governmental action, as whether it be "regulation" or merely "indirect discouragement," but on whether the action has an impact on speech and assembly. The latter is simply a factual question, and the facts are here established by the allegations of the complaint, which clearly and in detail alleges that the respondents' actions have seriously restricted the petitioners' exercise of speech and assembly.

This analysis is supported not only by the *Doubs* decision but also by the points on which we have previously dwelled—that the First Amendment can have no current vitality if judicial review is ousted when speech is effectively “discouraged” though not directly suppressed; that the First Amendment is available against “abridgement” of the liberties with which it is concerned, and not merely against “deprivation” of those liberties.

In the *Doubs* decision, the Court gave an illustration of indirect “discouragements” which “undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes.” The court stated: “A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.” The Attorney General’s listing of the National Council as a “subversive” organization is in all important respects an arm-band requirement.

The wearing of an arm-band in itself causes no harm to the wearer. Indeed, people often wear arm-bands voluntarily and even proudly. The government may sometimes require its wearing without being offensive, as in the case of volunteer police, members of the military forces, or the marshals of a parade. A governmental requirement of the wearing of an armband is hurtful only when it symbolizes a governmental determination that the wearer is an obnoxious person. The wearer is thus identified to the public as one to be shunned or harmed.

The Attorney General’s listing of the National Council as a “subversive” organization, like a requirement that Jews wear arm-bands, embodies a governmental determination that the wearer is obnoxious to the government. Like an arm-band requirement, it harms the National Council by stimulating the public to shun or to harm it. If the invidious arm-band requirement is reviewable for conformity to the First Amendment, then so must be the invidious designation of organizations. For both the banding and the

designation have the same function and method—to embody governmental condemnation and to subject the condemned to the extra-legal sanctions of public disapproval.

The arm-band analogy completely exposes the hollowness of the point made below that the harm to the National Council cannot be legal injury because it stems only “indirectly” from the listing. So the wearer of the arm-band suffers only “indirectly” from the order requiring him to wear the band; the direct harm is inflicted by those who see it.

Under the reasoning of the decision below, an arm-band requirement would be reviewable because it would command the individual to do something. But to assign this as a basis for review is irrational. For obviously what is commanded does not in itself cause the injury—the weight of an arm-band is not onerous. The damage is done by the governmental branding and the public’s response thereto. And whether the brand is accomplished by arm-bands or by listing is a matter of legal indifference. If the government should post the names of all Jews in the post offices and newspapers, it would accomplish the same result as if it made them wear identifying bands. But by the logic of the decision below this difference in mechanics and the absence of any command to the Jews would make any challenge of the posting “non-justiciable,” at least if the government claimed that its posting was merely to identify Jews so as facilitate the taking of the census.

Other authorities also establish that judicial relief is available against governmental action which stimulates others to conduct which interferes with First Amendment freedoms. In *Illinois ex rel McCollum v. Bd. of Education*, 333 U.S. 203, a First Amendment interest was protected against invasion by governmental disclosure of religious non-conformity. In *Thomas v. Collins*, 323 U.S. 516, the First Amendment was applied to invalidate a disclosure of identity as a labor organizer as a prerequisite to speaking. In both these cases, the governmental action merely exposed

persons to conduct or attitudes of other persons which might have a restraining effect on the liberties of the complaining parties.

The foregoing establishes that the courts are required to review administrative action, including derogatory listing, which "indirectly" damages First Amendment freedoms by stimulating public revulsion. It is obvious that the persons who have standing to invoke such review must be those who suffer the damage by virtue of the government stigmatization. In this case, therefore, the National Council and the other petitioners have standing to sue, because it is they whose liberties have been abridged.

Their standing is not affected by the fact that the listing is part of a scheme which concerns government employees. Whatever may be the effect on government employees, the Attorney-General's listing interferes with the liberties of petitioners, and they must have standing to vindicate their own liberties. Even under the Fifth Amendment, as we shall see (*infra*, pp. 19-23), a person has standing to complain against harm caused to him by governmental action directed against another. The First Amendment, with its preferred position, must afford no less protection. Furthermore, the listing has an impact on the National Council at least as direct as that on government employees.

B. "Justiciability" and the Fifth Amendment

Petitioners invoke the Fifth Amendment to protect them against governmental deprivation of their liberties and property without procedural due process of law. The liberties of which they are deprived are liberties of speech, press, and association. The property interests of which they are deprived are the ability to use effectively and to augment the National Council's funds and other property.

For the purposes of the Fifth Amendment, unlike the First, it is necessary, as we have seen, to establish "deprivation." This term includes "regulation," but does not include administrative findings which are not "regulation".

Contrary to the holding below, the Attorney General's determination that the National Council is "subversive" is more than a mere finding and is "regulation" of which the due process clause takes notice. The listing, therefore, had to be made in accordance with procedural due process, and a "justiciable controversy" arises from the allegation that this requirement was not followed.

The cases hold that if an administrative finding or ruling fixes a status or establishes legal relationships so as to lay a foundation for future regulation, then the finding or ruling is itself a "regulation" controlled by the due process clause, even though it does not itself command or restrain action. *La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd.*, 336 U.S. 18; *Columbia Broadcasting System v. United States*, 316 U.S. 407; *Waite v. Macy*, 246 U.S. 606; *Rochester Tel. Corp. v. United States*, 307 U.S. 125; *Powell v. United States*, 300 U.S. 276. Thus in the *LaCrosse Telephone* case, a state labor board's certification of an employee bargaining representative was held reviewable for validity even though the certification itself commanded no action; however, the employer's refusal to bargain with the certified representative could have subjected him to an administrative order for the unfair labor practice of refusing to bargain with a certified representative.

Where the administrative finding has such a status-determining effect, an administrative hearing is required by due process. *Shields v. Utah Idaho Central R.R. Co.*, 305 U.S. 177.

The determination here made by the Attorney General falls squarely within the status-determining principle, since it fixes the status of the National Council as a "subversive" organization for the purpose of supplying a foundation for action by agency loyalty boards, agency heads, and the Loyalty Review Board in discharging employees or refusing to employ applicants. This is, indeed, a conclusive fixing of status, since the loyalty boards and agency heads cannot, under the terms of the Executive Order, reject the Attorney General's determination as erroneous.

The situation presented is like that in the *Columbia Broadcasting* and *Waite* cases, *supra*. In the *Columbia Broadcasting* case, the FCC adopted a rule for its own future guidance in granting or denying radio station licenses. The Court held that this rule was itself a reviewable order even prior to any licensing action based thereon, since it fixed the status of future license applicants. So here the Attorney General's determination fixes a rule for the guidance of agencies and boards in granting or denying a license for federal employment. This case is, indeed, stronger, for in *Columbia Broadcasting* the ruling could have been changed in the licensing proceeding by the agency passing on license eligibility, whereas here the Attorney General's ruling cannot be changed by those passing on employment eligibility. Furthermore, the FCC ruling was, unlike the Attorney General's ruling, in general terms and did not pass on any particular radio station by name.

In *Waite v. Macy*, *supra*, the Secretary of the Treasury adopted a rule laying down tests as to what constituted impure tea. A Tea Board regularly applied this rule in determining which tea was importable and which should be excluded. The Secretary's rule was held to be an order reviewable on complaint by a tea importer even without action by the Tea Board excluding his tea. So here the Attorney General's ruling that the National Council is "impure" for purposes of proceedings relating to exclusion of persons from federal employment is a reviewable order.

Accordingly, the Attorney General's determination is a regulation and a reviewable order which must conform to due process requirements, since it establishes standards (defines status) for proceedings determining eligibility for federal employment.

The fact that this status is determined for proceedings determining eligibility of members or supporters of the National Council rather than eligibility of the National Council itself does not affect the standing of the National Council to test the determination. This is because the

determination and the action pursuant thereto have an impact on the relationship which employees or prospective employees have with the National Council and thereby regulate the Council itself. Thus, as the complaint alleges, the finding has induced government employees to abandon or desist from membership in the Council and from giving it financial support. So in *Pierce v. Society of Sisters*, 268 U.S. 510, a school was held able to test the validity of a law which directly regulated only pupils, but which had the effect of inducing pupils not to attend the complaining school. In *Truax v. Raich*, 239 U.S. 33, an employee was able to test the validity of a regulatory statute which operated against employers, but whose effect was to induce the employer to discharge the employee. In *Buchanan v. Warley*, 245 U.S. 60, a white person was able to test the validity of an ordinance prohibiting colored persons from buying his house. What is important, in other words, is not the person against whom the regulation is directly addressed, but the relationship regulated, and the various parties to that relationship have standing to test the regulation.

Even this complication is not present in the case of the individual petitioners. They, as potential government employees⁵ and as members and officers of the National Council, are directly "regulated" by the finding which creates for them the status of prima facie ineligibility for government employment on grounds of "disloyalty."

It is true that petitioners are not presently applicants for federal employment. But for them to apply would be a futile and meaningless gesture so long as there is in effect a rule which clearly would exclude them as leading spirits of the National Council. Their status is, therefore, as firm as that of the tea importer in *Waite v. Macy, supra*, who was able to challenge a rule which would have excluded his tea without waiting to have it actually excluded.

⁵ Paragraph 41 of the complaint alleges that some of the individual petitioners have in the past had government employment, and that because of their expert professional knowledge the individual petitioners had a reasonable expectancy of similar employment in the future, which had been impaired, if not destroyed, by respondents' actions. R. 15, 16.

It is apparent that the distinction between "regulation" and "mere administrative finding" may in certain cases involve niceties. In our view, this, if ever, was a case where the leaning should be toward finding "regulation." In other cases, usually the person complaining of the finding has a later opportunity to contest it by challenging the future action based upon the finding. But no such opportunity is available to the National Council precisely because the immediate impact of the future application is on individuals. What is more, under the Executive Order even those individuals have no opportunity in the administrative exclusion proceeding to attack the validity or accuracy of the Attorney General's designation.

C. "Justiciability" and Ultra-Vires Action

Petitioners seek relief from being defamed by administrative action which is in excess of governmental power and which violates a federal statute.

It is a truism that not all harm caused by unconstitutional or unauthorized administrative action is redressable. The person harmed is entitled to judicial intervention only if he shows "legal injury," that is, harm to legally protected interests.

When the validity of administrative action is challenged under the First and Fifth Amendments, there is no problem as to the source of the legally protected interests. These Amendments themselves create such interests in persons, the First creating certain protected interests in expression and assembly, and the Fifth creating certain protected interests in the procedures of regulation. Where, however, the challenge is that the administrative action is ultra-vires of the power of the Executive or of the powers of the federal government under the Tenth Amendment, the case is different. In Tenth Amendment cases, unlike First and Fifth Amendment cases, the protected interests must be found in a source other than the Tenth Amendment itself. The Tenth Amendment, in other words, is regarded not as

creating individual rights but rather as imposing duties owed to the body politic. In Tenth Amendment cases, therefore, it is not enough to show harm caused by *ultra-vires* action; the harm must be to an interest protected by some other provisions of the Constitution, by statute, or by common-law. *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118; cf. *Perkins v. Lukens Steel Co.*, 310 U.S. 113. The test as to whether the interest invaded by a Tenth Amendment violation is protected by common-law is whether the invasion was one which would be subject to legal redress if committed by a private person (i.e., "tortious").

Thus in the *TVA* case, *supra*, the plaintiff suffered damage from competition by the TVA's engaging in activities challenged as exceeding federal power under the Tenth Amendment. The Court held that since "competition between natural persons is lawful" (at 138), plaintiff had asserted no right "protected against tortious invasion" (at 137), and hence had shown no harm to a legally protected interest. The case, then, would have been otherwise if the harm resulting from *ultra-vires* action had been caused not merely by competition, but by competitive practices of a kind which are normally tortious (certain "unfair business practices"). In the *Perkins* case, *supra*, the harm suffered by plaintiff was exclusion from selling goods to the federal government unless it complied with conditions imposed by the Secretary of Labor allegedly in violation of statutory provisions. The Court held that the plaintiff had not shown legal injury. Since, generally speaking, a prospective seller has no legal redress against a private person who refuses to buy the seller's goods except on his own conditions, the Secretary's determination could not be challenged even if it violated the statute. As stated by the Court (at 129), "The contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation." The statute involved was, then, like the Tenth Amendment, regarded as creating not individual rights but only a duty to the body politic. Hence, as in Tenth Amend-

ment cases, violation of the statute was actionable only if the harm caused was tortious if committed by a private person (or was to interests created by the Constitution or some other statute). The case would have been different if the statute, like the First and Fifth Amendment, created individual rights, in which case all the plaintiff would have had to show would be a violation of the statute and harm resulting therefrom to the rights created. Thus if a statute requires an official to buy from a named individual, the latter can restrain the official from buying from others instead.

Under the *TVA* and *Perkins* cases, therefore, if appellees' actions are in excess of their constitutional authority, redress is available if those actions injure interests which by common-law, statute, or Constitution are normally given protection. So therefore, legal and equitable writs have run to redress or restrain harm to common-law rights by the unauthorized actions of government officials. *Land v. Dollar*, 330 U.S. 731; *Philadelphia Co. v. Stimson*, 223 U.S. 605; *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94. Obviously, this test is different than the theory of the decision below (properly applicable only to due process rights) that rights exist only against administrative action which is "regulation."

We leave to later discussion the question of whether respondents' actions were in fact beyond their authority. At present, we consider only whether petitioners have acquired standing to make this contention and have presented a "justiciable controversy" by showing that respondents' actions, if *ultra-vires*, harm interests which are normally protected.

Clearly they do so in two respects. First, they harm interests in free speech, press and assembly, and these are constitutionally protected.

In addition, they harm the interest in reputation which is protected by the common law against invasion by private persons and thus, as we have seen, against invasion by *ultra-vires* administrative action.

The complaint alleges that respondents have published, and are continuing to publish, the "finding" that the National Council is an organization which is "totalitarian, fascist, communist or subversive" or which has adopted "a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means." The application of such a description to an individual is clearly actionable defamation since it impugns his reputation so "as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." 3 *Restatement, Torts*, sec. 559. A statement that a person is a Communist, a Communist representative, or a Communist sympathizer has been repeatedly held to be libelous. *E.g. Spanel v. Pegler*, 160 F. (2d) 619; *Wright v. Farm Journal, Inc.*, 158 F. (2d) 197; *Grant v. Readers' Digest Association*, 151 F. (2d) 733, cert. den. 326 U.S. 797; *Mencher v. Chesley*, 297 N.Y. 94, 75 N.E. (2d) 257.

Accordingly, the individual petitioners have been injured in their interest in reputation, protected by the common-law, since the characterization of the National Council obviously impugns those who, like the petitioners, are its leading spirits and agents in the public eye.

The National Council, of course, has been even more directly defamed. A non-profit membership corporation which "depends upon the financial support of the public" suffers actionable defamation from publication of any matter "which tends to prejudice it in public estimation and thereby to interfere with the conduct of its activities." 3 *Restatement, Torts*, sec. 561(2). Accord: *N.Y. Society for Suppression of Vice v. MacFadden Publications*, 260 N.Y. 167, 183 N.E. 284. Obviously the Attorney General's designation is of such a nature. Cf. *Pullman Standard Car Mfg. Co. v. Union*, 152 F. (2d) 493, holding a corporation libeled by statements reflecting on its patriotism.

It follows from the foregoing that petitioners have legal redress for such defamation if respondents' actions were beyond their statutory or constitutional power.⁶

Here is most glaringly exposed the error of the court below in extending to all rights the doctrine that publication alone does not violate rights under the due process clause. For it is only publication and "regulation" that violate rights in reputation. This right, derived from common-law sources, is not affected by the due process clause requirement of "regulation" any more than are other common-law rights against tortious actions or breaches of contracts.

II. Respondents' Actions Are Illegal.

A. Violation of the First Amendment

The foregoing has sought to demonstrate that petitioners' complaint presents a justiciable controversy and that petitioners have standing to sue. We turn now to an examination of whether the respondents' actions are contrary to law.

From the allegations of the complaint, as well as from what all persons know to be true,⁷ it clearly appears that

⁶ Government officials are not, because of policy reasons, liable in money damages for defamatory statements made in connection with their official actions. *Spalding v. Vilas*, 161 U.S. 483. But the elimination of the remedy at law obviously does not eliminate, but fortifies, equitable relief. Cf. *Groner*, C.J., concurring in *Glass v. Ickes*, 117 F. (2d) 273, 281; *United States v. Lovett*, 328 U.S. 303, 316.

⁷ Cf. editorial in the *Washington Post*, July 1, 1948:

From the moment that the loyalty review program was first promulgated by executive order this newspaper has condemned the absolute power conferred by it upon the Attorney General to single out voluntary associations which it advocates and not on account of any illegal or even improper acts that the Council of American-Soviet Friendship has been branded subversive by the Attorney General. To permit the Attorney General to place such a brand upon any groups for the mere advocacy of ideas is to permit him to silence all dissent.

If men may not join hands to espouse ideas which are unpopular then the constitutional guarantee of free speech and free association are mere myths. It is wholly on account of the currently unfashionable opinions which it advocates and not on account of any illegal or even improper acts that the Council of American-Soviet Friendship has been branded subversive by the Attorney General. To permit the Attorney General to place such a brand upon any groups for the mere advocacy of ideas is to permit him to silence all dissent.

the respondents' actions have wreaked untold injury on the petitioners' ability to speak, to obtain listeners, to write, to obtain readers, to assemble, and to obtain associates. This injury has been committed in the name of eliminating disloyal government employees. If the actions which have caused this injury are to be saved from the First Amendment, it must be only on the basis of the relationship of the Attorney-General's listing to the asserted objective of the executive's program to insure that government employees be loyal.

For present purposes, it is unnecessary to consider which of the limitations on the scope of the First Amendment is relevant to a consideration of the validity of the respondent's actions. For it is abundantly clear that neither can possibly be satisfied. The fact is that the listing of the National Council as a "subversive" organization has on the record not the remotest relevance to the elimination of disloyal employees.

The listing cannot and does not, therefore, remove or alleviate any clear and present danger that disloyal persons will enter or remain in the government service. If there is any such danger, the listing has nothing to do with it.

If the applicable test involves the balancing of competing interests, then there is no weight at all on one of the scales. For while the listing obviously impairs free speech, press and assembly, it contributes nothing to any effort to determine which government employees or persons seeking such employment are disloyal.

The reason why the listing of the National Council gives no assistance to the exclusion of disloyal employees is that the National Council, as shown by the uncontroverted allegations of the complaint, is completely loyal, "non-subver-

If the Attorney General can put the Council of American-Soviet Friendship outside the pale of decency by an arbitrary designation of it as disloyal, he can do the same in respect of any religious, political or social organization advocating unorthodox or unconventional beliefs. This is a power incompatible with a government of laws. It is a power irreconcilable with freedom.

sive" organization. In view of the National Council's purposes, policies, and activities, as shown by the complaint, an individual's membership in or support of the National Council cannot possibly be evidence that the individual is disloyal. As stated by Judge Edgerton, dissenting in the *Joint Anti-Fascist* case (at 86): "On the present record, appellee's ruling against appellant has no more tendency to promote the efficiency of the civil service than a similar ruling against the Republican Party or the Methodist Church would have."⁸

Since the Attorney-General's listing of the National Council in no wise serves any function in determining loyalty, there exists no possible justification for the damage to First Amendment freedoms which arises from the administrative libelling of the National Council and its members and from the inhibiting of federal employees from belonging to or "sympathetically associating with" the National Council.

Nor can this arbitrary, purposeless blacklisting of the National Council be constitutionally justified by any assertion that the blacklisting power is important to a loyalty program. For the power must still be exercised so as to satisfy the legitimate governmental interests without any unnecessary invasion of liberties. If, arguendo, the Attorney General may designate "subversive" organizations for the purpose of determining eligibility for government service, certainly he has no power to designate as disloyal or "subversive" organizations which, like the National Council, are loyal and "non-subversive." *Cf. Ex parte Endo*, 323 U.S. 283. It is incumbent upon the government in administering any employee loyalty program to employ a procedure which will accomplish its purposes without denying to others rights guaranteed by the First Amendment.

⁸ In the *Joint Anti-Fascist* case, the majority apparently considered it to be of some significance that the complaint there involved did not expressly deny that the organization fell within the "subversive" categories of the Executive Order. 177 F. (2d) at 81. The complaint in this case does contain such an express denial. R. 10.

Cf. Thornhill v. Alabama, 310 U.S. 88; *Winters v. New York*, 333 U.S. 507. As stated in *Thornhill's* case (at 105), measures which even indirectly impinge on civil liberties must be "narrowly drawn to cover the precise situation giving rise to the danger."

Instead of adopting standards and procedures addressed to the precise situation of danger, the Executive Order and the Attorney General have wilfully chosen an approach which guarantees error and injustice. The Executive Order leaves to the unfettered discretion of the Attorney General what organizations should be listed. The Attorney General's action was taken without notice or hearing, without particulars, without supporting evidence, and without the opportunity to the National Council to know the evidence against it, to cross-examine witnesses, or to present evidence on its own behalf. Further, the standards in the Executive Order, "totalitarian, fascist, communist, or subversive," are without reasonably precise meaning or content. They are not defined by the Executive Order, nor have they been defined by the Attorney General. The end result of such a procedure is that the Attorney General may list any organization which incurs his displeasure, without regard to the aims and activities of that organization, and whether the organization be loyal or disloyal. And that is exactly what he has done. The government offers no justification for such a procedure, and none can be offered. Whatever may be the need to ferret out and discharge disloyal employees, the use of such arbitrary procedures and vague standards to the damage of lawful, loyal organizations and persons in the exercise of their constitutional rights of speech, press and assembly, clearly contributes nothing toward satisfying that need.

Furthermore, the lack of any procedure and meaningful standards enables the Attorney General to establish illegal conditions upon government employment. The imposition of conditions which restrict the right of government employees to hold and express lawful beliefs and opinions on political

subjects, such as those advocated by the National Council, is a violation both of the Constitution (*United Public Workers v. Mitchell*, 330 U.S. 75, 100) and of the Hatch Act, which provides that federal employees "shall retain the right to express their opinions on all political subjects and candidates" (5 U.S.C., sec. 118i). The clandestine process of determining which organizations are to be blacklisted obviously permits the Attorney General to close the government service to those who hold lawful political opinions of which he disapproves or, for that matter, to those whose religion or color may not please him. The decision below, however, would immunize such action from judicial review. It would enable the executive to impose unconstitutional and illegal conditions for government employment and then to avoid any inquiry into his illegal acts simply by making the bare, unsubstantiated, and untrue assertion that he acted pursuant to the President's "right and . . . duty to protect and defend the government against subversive forces which seek to change or destroy it by unconstitutional means" and to "protect the civil service from disloyal and subversive elements." See *Joint Anti-Fascist* case at 84.

It is true, moreover, that the whole process of listing "subversive" organizations serves no substantial function in eliminating disloyal employees. Accordingly, for the listing as a whole, as well as for the listing of the National Council, there is no basis for rescue from the First Amendment's prohibition of abridgement of speech. As we have already pointed out, the absence of any rational procedures and standards in itself guarantees that the listing can have little value. The chances of error are at least as great as the chances that the listing is correct. But there is more direct evidence of the inutilty of the listing.

By a directive to the Loyalty Review Board, the Attorney General listed the organization determined to be "subversive." In the same directive, the Attorney General instructed the Loyalty Review Board that it is the loyalty of the individual which must be the guide; that the doctrine

of guilt by association is not to be applied; and that "membership in, affiliation with, or any sympathetic association with, any organization designated is *simply one piece of evidence which may or may not be helpful* in arriving at a conclusion as to the action which is to be taken in a particular case." 13 F.R. 9366 (emphasis supplied).

Such then is the contribution of the Attorney General's listing toward removing any clear and present danger. Such is its value to be offset against the harm caused by the listing to democratic processes. The listing supplies only "one piece of evidence which may or may not be helpful."

It is obvious that to judge an individual's loyalty on the basis of his organizational affiliations rather than on the basis of his individual actions is irrational and dangerous.⁹ Such a method of judgment constitutes the stock-in-trade of irresponsible persons who are currently causing the demoralization of the federal service and the blasting of individual reputations and careers.

B. Violation of the Fifth Amendment

We have already seen that the Attorney General's designation of the National Council as a "subversive" organization, being a status-fixing regulation, is subject to the requirements of procedural due process. Clearly these requirements were not observed. The National Council was given no notice, charges, or hearing. Its request to the Attorney General for the particulars upon which he based his judgment and for a public hearing received only the curt

⁹ The President himself now seems to hold this view, although he has not carried it to the logical conclusion of abolishing the Loyalty Order listings. The President was recently criticized for appointing as Secretary of Air a person who had been associated with an organization which the critic considered to be the wrong kind of group for a defense minister to belong to. The President's reply defended not the organization, but the appointee, who, he stated, "is better equipped to be Secretary of the Air Force than any man in the United States and that is the reason I appointed him." He added: "All this howl about organizations a fellow belongs to gives me a pain in the neck. I'd be willing to bet my right eye that you yourself and I have joined some organizations that we wish we hadn't. It hasn't hurt me any and I don't think it has hurt you any." Letter of May 29, 1950 to Clyde A. Lewis, Commander-in-Chief of the Veterans of Foreign Wars, quoted in the New York Times, June 7, 1950.

and unresponsive reply that "the Executive Order contains neither provision nor authorization for any of the procedural steps to which you have referred" (R. 12).

The Executive Order does, however, provide (Pt. III, sec. 3) that the Attorney General's designation of an organization as "subversive" shall be made only "after appropriate investigation and determination." The complaint alleges that no such investigation was made (R. 11-12), and this allegation was admitted by the government's motion to dismiss. If this phrase in the Executive Order is to be given any meaning whatsoever, it is clear that the Attorney General misplaced his reliance on the Executive Order in denying notice, hearing, and anything which gave the National Council the slightest opportunity to furnish information about itself. By such a denial, the Attorney General violated the Executive Order.

Procedural due process requires an administrative hearing prior to the administrative adjudication. *Shields v. R.R.*, 305 U. S. 177; *Morgan v. United States*, 304 U. S. 1; *Lloyd Sabaudo v. Elting*, 287 U. S. 329. There must be given prior notice of the nature of the issues involved (*Morgan v. United States*, *supra*; cf. *United States v. Cruickshank*, 92 U. S. 542, 558, 559; *United States v. Cohen Grocery Co.*, 255 U. S. 81, 87, 89), as well as opportunity to examine the evidence and cross-examine witnesses (cf. *Motes v. United States*, 178 U. S. 458, 467, 471; *Kirby v. United States*, 174 U. S. 47, 55, 61; *United States v. Lovett*, 328 U. S. 313, 317), and to present evidence on one's own behalf (*Re Oliver*, 333 U. S. 257). The adjudication may not be made on the basis of evidence secretly collected and not revealed to the parties. *I.C.C. v. Louisville & N. Ry.*, 227 U. S. 88, 93; *United States v. Abilene*, 265 U. S. 274, 286, 291.

The lack of procedural due process in the establishment of the "subversive" list is augmented by the lack of standards for determination. The words "totalitarian, fascist, communist, or subversive" have no reasonably precise meaning, and the Attorney General has not defined them.

Finally, the Attorney General refuses to reveal the basis of his determination even after it is made.

No justification has been offered, nor does any exist, for this system. Besides being in total disregard of due process, it enables the Attorney General, in a boundless discretion and without necessity for accounting, to injure any organization which for any reason incurs his displeasure. In the present case, he has chosen, without particulars, without supporting evidence, and without a hearing, to brand an organization which engages only in the lawful propagation of ideas. If these practices are sanctioned, it can no longer be said that ours is "a government of laws, not of men." Frankfurter, J., in *United States v. United Mine Workers*, 330 U. S. 258, 307.

C. Violation of the Tenth Amendment.

The Constitution grants no power to any government official to list organizations as subversive or disloyal. Ours is a government of enumerated powers, and authority exercised by any of its branches must find its source in a power expressly or impliedly granted by the Constitution. *McCulloch v. Maryland*, 4 Wheat. 316; *United States v. Butler*, 297 U. S. 1; *Marshall v. Gordon*, 243 U. S. 521. The President, as well as Congress, possesses no power not derived from the Constitution. *Ex parte Richard Quirin*, 317 U. S. 1, 25, 26.

The listing of the National Council can not be rested on some implied power supplementing any authority of the executive to safeguard the efficiency and fidelity of the government service. For, as we have seen, the listing of the Council has not the remotest connection, and the listing as a whole no substantial connection, with any such safeguarding endeavor.

In the *Joint Anti-Fascist* case, the court below rested the right to designate organizations as subversive on the President's duty to execute the federal laws (Constitution, Article II, Sec. 3). But there is no law which is here being

executed. Section 9A of the Hatch Act, 5 U. S. C. sec. 118j, to which the court referred, makes ineligible for government employment members of any organization which "advocates the overthrow of our constitutional form of government in the United States." The Executive Order, however, calls for the listing of organizations other than those described by the Hatch Act.¹⁰ And this listing has no substantial relevancy to the efficiency or loyalty of government employees. Indeed, as we have already shown, the listings under the Executive Order violate another section of the Hatch Act (5 U.S.C. sec. 118i).

Furthermore, this Court has declared that no government official has power to prescribe orthodoxy of beliefs. *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642; *Hannegan v. Esquire*, 327 U. S. 146, 158; *Thomas v. Collins*, 323 U. S. 516, 545. The Attorney General has applied the Executive Order so as to make himself a judge of political orthodoxy and loyalty and so as to inform the public that certain ideas are officially discouraged and prohibited. He has thus violated the most revered traditions of our Constitution. See Commager, *Who Is Loyal to America*, *Harvard Magazine*, Sept. 1947; De Tocqueville, II *Democracy in America*, 117 (Bradley ed. 1945); O'Brian, *Loyalty Tests and Guilt by Association*, 61 *Harv. L. Rev.* 592, 605; Emerson and Helfeld, *Loyalty Among Government Employees*, 58 *Yale L.J.* 1, 116.

CONCLUSION

Without procedural safeguards, on the basis of secret evidence locked in the bosom of an administrative officer and never susceptible of rebuttal by those affected, and without fulfilling any legitimate governmental purpose, the respondents have made an auto-da-fe for the ideas espoused

¹⁰ The difference between Hatch Act organizations and those described in the Executive Order is self-evident. It has also been expressly recognized by the Loyalty Review Board and the Attorney General (13 F.R. 9368-9369) and the Comptroller General (17 U.S. Law Week 2327, Jan. 25, 1949). The respondents have never asserted that the National Council "advocates the overthrow of our constitutional form of government."

by the National Council and its supporters. The court below has heaped fuel on the flames by decreeing that the spurious plea of "security" immunizes repression from judicial review. The actions of the respondents and the decision below are incompatible with a government of laws and a free society. The judgment below should be reversed.

Respectfully submitted,

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APPENDIX**EXECUTIVE ORDER 9835 (12 F.R. 1935)***Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government*

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

Now, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I*Investigation of Applicants*

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon actual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

- a. Federal Bureau of Investigation files.
- b. Civil Service Commission files.
- c. Military and naval intelligence files.
- d. The files of any other appropriate government investigation or intelligence agency.
- e. House Committee on Un-American Activities files.
- f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.
- g. Schools and colleges attended by applicant.
- h. Former employers of applicant.
- i. References given by applicant.
- j. Any other appropriate source.

4. Whenever derogatory information with respect to loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular positions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

PART II

Investigation of Employees

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing depart-

ment or agency or to such person or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

PART III

Responsibilities of Civil Service Commission

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

- (1) Advise all departments and agencies on all problems relating to employee loyalty.
- (2) Disseminate information pertinent to employee loyalty programs.
- (3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.
- (4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the investigating department or agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive,

or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alert the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

PART IV

Security Measures in Investigations

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement, however, the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques, and an effective security control system for pro-

protecting such information generally and for protecting confidential sources of such information particularly.

PART V

Standards

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States.

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totali-

tarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI

Miscellaneous

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN

THE WHITE HOUSE,
March 21, 1947.

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No. 7

In the Supreme Court of the United States

October Term, 1950

**NATIONAL COUNCIL OF AMERICAN-SOVIET FRIEND-
SHIP, INC., ET AL., PETITIONERS**

**HOWARD MCGRATH, ATTORNEY GENERAL OF THE
UNITED STATES, ET AL.**

**ON WRIT OF HABEAS CORPUS IN THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ENTER FOR RECORD

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(1)

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 7

NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP, INC., ET AL., PETITIONERS

v.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the District Court for the District of Columbia (R. 17-19) is not reported. The *per curiam* order of the Court of Appeals for the District of Columbia Circuit, affirming on the authority of *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. 2d 79 (C. A. D. C.), was entered without opinion (R. 20).

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1949 (R. 20). The peti-

tion for a writ of certiorari was filed on January 23, 1950, and was granted on May 15, 1950 (R. 23). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioners have any legal standing or right to challenge a designation, made by the Attorney General pursuant to instructions issued by the President under Executive Order 9835, that petitioner National Council of American-Soviet Friendship, Inc., is a Communist organization.

STATUTE AND EXECUTIVE ORDER INVOLVED

Section 9A of the Hatch Act, 53 Stat. 1148, 5 U. S. C., Supp. II, 118j, and Executive Order 9835, 12 F. R. 1935, are set forth in the Appendix to the Brief for Respondents in *Bailey v. Richardson*, No. 49, this Term.

STATEMENT

This case was brought to challenge the designation by the Attorney General, for the purposes of the Federal government's loyalty program, of petitioner National Council of American-Soviet Friendship, Inc. as a Communist organization. The designation of organizations and the publication thereof pursuant to statute and executive order are fully described at pp. 14-24, of the Brief for Respondents in *Bailey v. Richardson*, No. 49, this Term, and pp. 3-4, of the Brief for

Respondents in *Joint Anti-Fascist Refugee Committee v. McGrath*, No. 8, this Term.

Petitioners herein, the National Council of American-Soviet Friendship, Inc., the Denver Council of American-Soviet Friendship, and six officers thereof (R. 4-5), allege that they have suffered irreparable injuries as a result of the above described designation and that the actions of respondents "have violated the rights of the plaintiffs guaranteed by the First and Fifth Amendments to the Constitution and are contrary to the Ninth and Tenth Amendments" (R. 13, 16).¹ Specifically, the injuries alleged are these: The National Council and Denver Council, whose avowed purpose is to disseminate educational material concerning the Union of Soviet Socialist Republics in order to strengthen friendly relations between the United States and the Soviet Union (R. 4, 9), have lost members, officers, sponsors, contributions, attendance at meetings, circulation of their publications, acceptance of their exhibits and other materials by educational institutions, have been denied meeting places and radio time, and have been unable to gain the support of federal employees (R. 13-14). It is further claimed that the National

¹ It is also alleged that the Attorney General's designation was made without the "appropriate investigation and determination" required by Part III, Section 3 of the Executive Order (R. 11-12), and that the National Council does not fall within the subversive categories of the Executive Order (R. 10).

Council has been deprived of its status as a tax exempt organization by the Treasury Department (R. 14) and that the personal and professional reputations of the individual petitioners have been damaged and their opportunities for public and private employment impaired (R. 13-15).

This action was brought on June 29, 1948, to enjoin respondents, the Attorney General and the Chairman and members of the Loyalty Review Board of the Civil Service Commission, from designating and publicizing the name of the National Council, or its affiliates, as a Communist organization, to direct respondents to remove the National Council's name from the list of designated Communist organizations, to make a public statement of this removal, and to take no action based on the inclusion of the National Council's name in the list of designated Communist organizations. Petitioners further prayed for a declaratory judgment that Part III, Section 3, and Part V, Section 2, of Executive Order 9835 are unconstitutional (R. 16).

Respondents moved to dismiss the complaint for want of a justiciable controversy between the parties and for failure to state a claim upon which relief can be granted (R. 17). Following a hearing, the District Court, on February 1, 1949, dismissed the complaint (R. 19). The Court of Appeals affirmed *per curiam* (R. 20).

ARGUMENT

The instant case, decided on the authority of *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. 2d 79 (C. A. D. C.), presents the same issues raised by petitioner in that case and advances the same major arguments. No. 8, this Term, *sub nom. Joint Anti-Fascist Refugee Committee v. McGrath*. The Brief for Respondents in the *Joint Anti-Fascist* case develops the reasons and authorities which, we submit, establish the correctness of the decision below. In addition, the Brief for Respondents in *Bailey v. Richardson*, No. 49, this Term, demonstrates the occasion for, and the validity of, Executive Order 9835. Accordingly, we need here advert only to the narrow contention that the individual petitioners herein have standing to sue as persons with a vaguely defined "reasonable expectancy" of future Government employment (R. 15, 16) made *prima facie* ineligible for such employment by reason of their relationship with the National Council (Br. for Pet. 22). We think it clear that they do not have such standing. Cf. *United Public Workers v. Mitchell*, 330 U. S. 75, 86-91.²

² It should be noted that petitioners' reliance on *Waite v. Macy*, 246 U. S. 606, is misplaced. Petitioners state that "the tea importer in *Waite v. Macy*, *supra*, * * * was able to challenge a rule which would have excluded his tea without waiting to have it actually excluded." (Br. for Pet. 22.) To the contrary, the collector at the port of entry had already excluded the complainant's tea in accordance with a regulation promulgated by the Tea Board; suit was brought to re-

CONCLUSION

For the reasons set forth above and in the Briefs for Respondents in the *Joint Anti-Fascist* and *Bailey* cases (Nos. 8 and 49, this Term), it is respectfully submitted that the judgment of the court below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

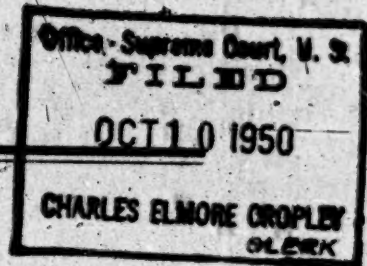
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Assistant Attorney General.

JAMES L. MORRISSON,
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OCTOBER 1950.

strain the Tea Board from applying its regulation to complainant's tea in an appeal taken to the Tea Board from the collector's action. See *Macy v. Brown*, 215 Fed. 456 (S. D. N. Y.) and 224 Fed. 359 (C. A. 2). Thus, complainant's position was similar to that of the petitioner (Poole) in the *United Public Workers* case who was held to have standing to sue because a proposed order for his removal had been adopted by the Commission after he had been charged with political activity (pp. 91-92).

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NATIONAL COUNCIL OF AMERICAN-SOVIET FRIENDSHIP,
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v.

J. HOWARD McGRATH, ET AL.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit.

REPLY BRIEF FOR PETITIONERS.

ABRAHAM J. ISSERMAN,
DAVID REIN,
JOSEPH FORER,
Attorneys for Petitioners.

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REPLY BRIEF FOR PETITIONERS.

The government's brief does not directly answer the petitioners' brief. Instead, it refers to the briefs filed by it in *Joint Anti-Fascist Refugee Committee v. McGrath*, No. 8 of this Term, and *Bailey v. Richardson*, No. 49 of this Term.

This amalgamation is made to serve more than the administrative convenience of the government. It facilitates

the suggestion that the present case is one of a group making a general attack on the government's loyalty program and seeking to set aside Executive Order 9835. It obscures the government's evasion of the facts in this case and the arguments which have been made by these petitioners. It supplies an opportunity for importing into this case an irrelevant discourse on recent history and foreign affairs as viewed by the government.

Of course, the petitioners have not attacked the loyalty program generally, vulnerable though that program is. Consistent with the recognized standards for judicial review, the petitioners have presented for adjudication the validity of the specific actions taken by the respondent to the damage of the petitioners in falsely defaming them, in abridging their exercise of the freedoms of speech, press and assembly, and in depriving them of liberty and property without a scintilla of due process.

One conspicuous fact emerges from the government's briefs. Nowhere has the government even attempted to offer the slightest justification for the harm inflicted by the respondents on the petitioners without warrant and without procedure.

I. The First Amendment.

The government concedes that the actions of the respondents have resulted in impairing the effective exercise by petitioners of their rights of speech, press and assembly. But this impairment, it contends, does not supply a justiciable controversy, because it was occasioned not directly by the respondents' actions, but by the adverse public opinion which those actions stimulated. If, nevertheless, the controversy is justiciable, then for the same reason and in the interests of the loyalty program, the government urges, the respondents' actions do not violate the First Amendment. Nothing more than the government's ipse dixit is offered to support this theory of the immunizing effect of an inter-

vening public opinion provoked by the actions complained of. No attempt is made to support this theory by reference to the purpose and function of the First Amendment. While the *Doubs* case (339 U. S. 382) is cited, conveniently overlooked is its exposition that discouragement of speech by indirect, conditional, consequential abridgement creates a justiciable controversy and may be invalid under the First Amendment. Simultaneously, the government intrudes irrelevant references to the function of "disclosure." Of course, what this case involves is not disclosure, but a false libelling.

Under the *Doubs* decision, indirect, consequential abridgements of speech, press and assembly are tested for validity by balancing the competing interests. As we pointed out in our principal brief, the National Council is, on the record, a loyal organization, affiliation with which can in no way be evidence of disloyalty. Accordingly, the listing of the National Council serves no governmental interest related to the guaranteeing of a loyal government service. On the contrary, its listing, being false, can only interfere with action legitimately designed to insure the faithfulness of government servants. This circumstance alone is dispositive. In addition, however, we insisted that the listing process as a whole served no substantial purpose in the interests of obtaining loyal government employees. Our argument to this effect is fully corroborated by the government itself. For it states: "Participation in the activities of a designated organization is simply one piece of evidence which may or may not be helpful in arriving at a conclusion based on all the evidence that reasonable grounds exist for belief that the employee involved is disloyal" (G. Br. in No. 8, at 8; and see at 22-23, and 33).

The government explains that organizational affiliation is one of the objective facts which assist the determination of the loyal or disloyal state of mind, and that centralization of the examination of the character of organizations is

administratively desirable (*id.* at 23). But this explanation is somewhat deficient. It does not explain how a listing of a loyal organization helps determine disloyalty. Nor does it explain why the centralized examination wilfully refuses to adopt any procedure which can assist making accurate, relevant determinations, and which can afford protection to the right of assembly.

We submit that the government's own description of the inutility of the listing and its failure to explain the absence of any rudimentary procedure in assistance of determination unite to belie the government's outraged insistence that the listing is not a political blacklist, but is merely a piece of information and advice for the loyalty boards (*id.* 17-18, n. 9). For whatever may be said in the Executive Order or in the Attorney General's letter to the Loyalty Review Board, the fact remains that the listing, false as it is and adopted without procedures and standards, serves only one objective purpose, that of the political blacklist. Indeed, the latter portion of the government's brief in No. 8 (at 40-50) is no more than an attempted justification of the right to establish a political blacklist, as when it states: "It is the President's duty and his right to inform the people of those groups whose activities are, in his judgment, inimical to the public welfare" (at 42).

The government carefully fails to reply to our point that a listing without hearing and without judicial review is tailored to enable the Attorney General to list any organization which he desires to injure for reasons which may be wholly invidious. It does not attempt to rebut our contention that there is nothing to prevent the Attorney General from blacklisting religious organizations, as, say, the Methodist Church, the Catholic Church, or Jehovah's Witnesses.

In fact, the Attorney General has blacklisted a religious group, having included in the loyalty program listing the Shinto Temples (see G. Br. in No. 49, at 141). For all that appears, this listing of an ancient religion may have been

occasioned only by the Attorney General's private prejudices. Indeed, it is significant that in a case involving a somewhat related factual issue, a federal District Court recently found that there was no evidence of any enemy taint to support an order of the Attorney General vesting in himself as Alien Property Custodian the assets of a Shinto shrine. *Kotohira Jinsha v. McGrath*, 90 F. Supp. 892. It is also significant that in that case, as in this, the Attorney General tried to justify his action by appealing to "security" needs as a substitute for evidence. Thus the government's argument was described as follows by the court (90 F. Supp. at 897):

But it is argued that the Court must be mindful of the times and of the danger to the United States of foreign ideologies. In this contention it is argued that Hitlerism, Communism, and Shintoism are but sisters under the skin, and who knows but the spirit of Shintoism might rise again to endeavor to conquer the world unless by vestings like this it is stamped out.

The court was forced to the following remarks (*ibid.*):

The undisguised fact is that this plaintiff's property was vested—taken away—because what plaintiff believes in was disliked or suspected, and by taking away its base of operations, its fervor for its beliefs would tend to diminish and eventually vanish. Not until the evidence was concluded was I willing to even listen to argument on this point, for I could not believe it. I still do not believe the Attorney General really acted on such a basis—even though such evidence as the Court was given might so indicate.

II. The Fifth Amendment.

As our principal brief pointed out, the petitioners are "regulated" so as to be able to invoke the protection of the Fifth Amendment because the Attorney General's list fixes the status of the National Council as a "subversive" organization for the purposes of the loyalty program. The

government concedes that the listing is a final and conclusive determination of status, but insists that the determination is not a "regulation" because the loyalty order does not make mandatory the dismissal from government service of members of the National Council.

The argument is disingenuous. Whether or not dismissal is mandatory for membership in listed organizations, the fact remains that the listing coerces government employees into leaving or refusing to join the National Council. The apprehension of being dismissed for disloyalty or even of being subjected to a loyalty investigation and hearing is enough to cause this result. We must suppose that government employees are aware that, as the government's brief in the *Bailey* case (at p. 91) puts it, "The President is entitled to insist that government servants, like Caesar's wife, be above reproach."

Contrary to the government's suggestion, the present case is stronger for petitioners' standing to sue than *Columbia Broadcasting System v. United States*, 316 U. S. 407. The regulation which the plaintiff there was held to have standing to challenge did not automatically disrupt the ties between the plaintiff and its affiliates. The regulation expressly provided that stations could remain affiliates without prejudice to their licenses during their prosecution of litigation to test the validity of a prohibition against affiliation. Yet the Broadcasting System was held able to test the regulation because, as its complaint stated, its affiliates abandoned it rather than go through the trouble and expense of litigating the validity of the regulation. The government argued in that case, as in this, that the Broadcasting System had no standing to sue because disaffiliation was not mandatory. This argument was accepted only by the dissent (316 U. S. at 445-446). It was rejected by the Court (*id.* at 424).

Furthermore, the Attorney General's list has fixed the status of the National Council for purposes other than the

loyalty program. Thus membership in a listed organization prevents an exercise of administrative discretion, unreviewable in court, to suspend deportation of an alien. Cf. *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. (2d) 489. And the listing has caused an administrative ruling depriving contributors to the National Council of a tax deduction (R. 14). Of course these contributors can litigate the denial of the deduction. But so the radio stations in the *Columbia Broadcasting System* case could litigate the denial of a license.

The government seeks to rebut the standing of the individual petitioners by *United Public Workers v. Mitchell*, 330 U. S. 75. But the *Mitchell* case merely involved a refusal by the Court to review hypothetically projected action. Here the individual petitioners complain not of a hypothetical situation, but of an actual one. Even though, in theory, ordinary members of the National Council may obtain government employment, the listing is completely meaningless if the petitioners, who guide the National Council's activities and policies, may obtain such employment. We suggest that any government official who would hire them would himself become a suspect under the loyalty program. The status of the individual petitioners is like that of the plaintiffs in *United States v. Lovett*, 328 U. S. 302, where the Court said (at 314): "Were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputations and seriously impaired their chance to earn a living, could never be challenged in any court." Even in the *Bailey* case, the Court of Appeals held that the plaintiff could, even after administrative hearing, challenge the ruling barring her from future government employment. *Bailey v. Richardson*, 182 F. (2d) 46, 54, 55. Here too the individual petitioners have been effectively barred from future government employment.

III. The Tenth Amendment.

In our principal brief we urged that a suit may be brought for injunctive relief against defamation by a governmental official where the official acted in excess of his authority and Constitutional power.

We do not dispute that no action for damages for defamation will lie against public officials for statements made in their public capacity. *Spalding v. Vilas*, 161 U. S. 483. But the policy reasons which underlie that doctrine have no application here. The government argues that "the threat of prosecution for contempt for non-compliance with an injunction is as effective a deterrent to the exercise of their public functions as the threat of money damages at law" (G. Br. in No. 8 at 40). But an injunction is issued only after a judicial determination of the impermissible conduct and that conduct is precisely defined and prohibited. The suggestion that government officials should be free to take action which has been judicially determined to be illegal and unconstitutional is simply a piece of arrogance having no policy basis.

The government misplaces its reliance on *United States v. Los Angeles & St. L. R. Co.*, 273 U. S. 299, and *Tinkoff v. Campbell*, 86 F. Supp. 331. These cases merely held that defamation was not actionable if the defendant's action was within his lawful, constitutional powers. Our claim is that defamation is actionable if, and only if, it is outside of those powers, and the latter allegation is necessary to give standing to sue. The case of *Hearst Radio v. F. C. C.*, 167 F. (2d) 225, merely held that review was not available under a certain section of the Administrative Procedure Act.

The government urges that the source of the blacklisting power is Article II, sections 1 and 3, of the Constitution. But the power to send messages to Congress and to execute federal law does not by any stretch permit the executive to prescribe orthodoxy of opinion. See *Jackson, J. in West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642, and in *Thomas v. Collins*, 323 U. S. 516, 545.

The government suggests that the executive's actions are immunized from judicial review if they are claimed to be in the "interest of national safety," or to be part of a "national security problem," or to involve "potential threats to the government's existence." (G. Br. in no. 8, at 40-43). If constitutional rights may be suppressed simply on the basis of formal recitals that the action is taken for the national safety, it is hard to perceive that the Constitution stands in the way of naked dictatorship.

The Attorney General's listing may not be properly analogized to a speech or press statement of the President or the Attorney General. The listing is an officially promulgated regulation, published in the Federal Register, establishing a continuing rule of governmental administration, and surviving the term of office of the official who promulgated the list.

Respectfully submitted,

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Attorneys for Petitioners.